Joint Council on international children's services

November 21, 2003

To: U.S. Department of State
CA/ OCS/ PRI
Adoption Regulations Docket Room
SA-29
2201 C Street, NW
Washington, D.C. 20520
Electronically emailed to: adoptionregs@state.gov

Re: **State/ AR-01/ 96**

JCICS Comments on 22 CFR Parts 96
Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000;
Accreditation of Agencies; Approval of Persons; Proposed Rules

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Profile of JCICS

Joint Council on International Children's Services (JCICS) is a non-profit charitable organization comprised of North American international adoption agencies, child advocacy groups, parent support groups and medical clinics. Established in 1976, JCICS is the oldest and largest association of non-profit organizations focused specifically on international adoption. Our mission is to advocate on behalf of children in need of permanent families and to promote ethical practices in intercountry adoption.

JCICS represents 195 adoption organizations. Current membership includes:

- 171 Adoption Agencies
  - 19 Homestudy and Post Placement Agencies
  - 152 Placement Agencies and Dual Agencies (performing both home studies and placements)
- 14 Parent Support/ Advocacy Groups
- 10 Medical Clinics

In 2002, JCICS member agencies placed over 15,000 children through intercountry adoption, which is approximately 75% of all internationally adopted children placed in the U.S. last year. For more detailed statistics on JCICS membership please consult *Appendix A*.

JCICS Response to the Hague Convention

Joint Council embraces the ideals embodied in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, including:

- a child's right to grow up in a permanent family environment;
- sending and receiving countries and adoption service providers establishing and maintaining adoption practices that protect children and their families and that acknowledge the life-long impact of adoption;
- encouraging ongoing dialogue and cooperation between countries to ensure the continued viability of adoption as an option for children in need.

Joint Council believes that every child should remain with their birth parents or should be adopted by a family within their country of birth whenever possible. When those options are not readily available, international adoption should be a viable option. Institutionalization and foster care do not provide optimal conditions for the full emotional and physical development of children.

Through the years-long US implementation process, Joint Council has actively participated in the development of standards and procedures. We have been a source of information regarding current practices and a voice for the application of practical and workable solutions to implementation challenges. We look forward to continuing to be a voice for intercountry adoption and appreciate having the opportunity to submit our comments on the proposed Hague regulations.

Summary of Significant Concerns

Most significantly, we are concerned by the **insurance provision in 96.33(h) and the risk and liability requirements in 96.39(d), 96.45 and 96.46**. Affordable insurance is currently extremely difficult for international adoption agencies to obtain. The exorbitant costs continue to escalate. Many agencies are not able to find a carrier willing to provide coverage despite an absence of complaints. In addition, the proposed regulations would impose strict liability clauses with which we fear insurance companies will not comply (see *Appendix B*). Following is a summary of our main concerns regarding this issue:

- **The one million dollar insurance provision per occurrence is unwarranted and nearly impossible to satisfy.** The Intercountry Adoption Act (IAA) does not state a minimum dollar amount for insurance coverage; rather, it states that coverage must be "adequate". One million dollars seems excessive when damages for a single occurrence rarely reach that amount. Mandating such a high floor of coverage will force many agencies out of business due to the current difficulty of obtaining affordable insurance. (see page 8 for more information)

- **The definition of blanket waivers is ill defined.** It is imperative to educate prospective clients on the various risks associated with intercountry adoption. This regulation would appear to substantially alter the current practice of informed waiver consent, interfere with a business practice that has been upheld in the courts, and may encourage superfluous litigation. In addition, it prohibits adoption agencies from protecting themselves from circumstances beyond their control. (see page 13 for more information)

- **Regulations 96.45 and 96.46 require accredited agencies to be legally responsible for the acts of their supervised providers.** This proposal raises several concerns. It is often the prospective adoptive parents' decision regarding the local service and placing agency they will be using – thus, this proposed change would impose a connected relationship at the family's request, not the agency's. This regulation would have a detrimental economic impact on small entities. Primary providers would be reluctant to work with a supervised provider, in an effort to avoid the liability requirements, which may force supervised providers out of business. This requirement places an enormous financial burden on agencies and seeks unreasonable insurance provisions. Furthermore, this proposed structure promotes litigation and is an excessive requirement. (see page 15 for more information)

JCICS is also concerned that **Subpart K does not stipulate a fundamental due process that adoption agencies have a right to expect, which would include notices, standards of proof, hearings, an internal review process, timeframes, etc.** Currently, the regulations assume that adverse action is warranted because of deficiencies, and does not provide for an agency to appeal an accrediting entity's decision on the basis that it was unfounded or taken improperly. We would like to see more detail presented in this regulation to ensure that agencies are fairly represented. (see page 20 for more information)

Lastly, we are concerned by the provision in **96.37(f) and believe that requiring the home study personnel to have a master's degree is unnecessary limiting.** This provision would limit the qualified applicant pool for such positions thereby restricting

choices for prospective adoptive parents and increasing costs. Moreover, there is inequality in the provisions since a bachelor's degree would be sufficient for non-supervisory employees, as described in 96.37(e), as long as they also have prior experience. (see page 10 for more information)

In the following pages JCICS has attempted to describe the potential unintended consequences of the provisions, provide recommendations for improving the proposed rules, as well as highlighting the proposals we support.

JCICS would like to express our appreciation for having the opportunity to provide comments on these proposed regulations. If we can be of any assistance to the Department please contact Antonia Edwardson, Executive Director at (703) 535-8045.

Comments and Recommendations on the Regulations

- Recommend the reissue of the proposed regulations.

JCICS requests that, rather than issuing final regulations, the Department reissue the proposed regulations following the December 15th public comment period. While we are pleased to see more information included in the regulations, we believe that additional data needs to be presented and incorporated into the regulations before they are finalized. This would allow a greater opportunity for open debate and input from legislative and State regulatory sources. While JCICS supports the United States' accession to the Convention, we would rather postpone the finalization in order to ensure that the regulations are truly comprehensive.

Subpart B – Selection, Designation and Duties of Accrediting Entities

96.5 – Requirement that accrediting entity be a non-profit or public entity.

- Recommend the following revision:

> (a) an organization **or proposed organization** described section 501(c)(3) of the Internal Revenue Code of 1986...

JCICS is concerned that the probable pool of entities willing to serve as accrediting entities is currently so small as to approach a monopoly or oligopoly. We fear that public entities do not have sufficient standards or infrastructure to support such an undertaking. State licensing bodies are often understaffed and under funded. Currently, those responsible for licensing often have little experience with international adoption and do not know how to analyze the practices of an agency.

Adding the language of "or proposed organization" would help ensure that non-profit organizations in formation could apply to become an accrediting entity. The current language seems to imply that only existing organizations could apply to be accredited. JCICS assumes that, in the future, accreditation will be open to other organizations as well. Thus, by clarifying that other organizations would have the opportunity to apply as accrediting bodies, JCICS members would be assured that accreditation will not be dominated by one or two entities.

Subpart C – Accreditation and Approval Requirements for the Provision of Adoption Services

96.13 (a) Home studies and child background studies.

JCICS recommends the following minor but important changes.

- Recommend the following revision:

> (a) A social work professional or organization that is performing a home study ... but is not **currently** providing any other adoption service in the case is an "exempted provider."

Adding the word "currently" would allow the exempt organization to later become a supervised provider, once a client selects a placing agency that will require post-placement services from the home study provider.

- Recommend the following revision:

> (a) [3rd sentence] **Once** the agency or person provides another adoption service in the case in addition to the home study...

Substituting "Once" for "If" in the sentence clarifies the sequence of events outlined above.

- Recommend the following revision:

> (a) [4th sentence] The home study or child background study prepared by an exempted provider must be submitted to an accredited agency or temporarily accredited agency, not an approved person, for review and re-approval.

Clarifying "re-approval" instead of "approval" denotes that the study was approved first by the home study agency as required by state and federal regulations and then is submitted to the accredited or temporarily accredited agency for re-approval.

Subpart F – Standards for Convention Accreditation and Approval

96.30 State Licensing

- Recommend the following revision:

> (c) If it provides adoption services in a State in which it is not itself licensed or authorized to provide such services, the agency or person does so only **in cooperation with** agencies, persons, or other entities that are licensed or authorized by State law to provide adoption services in that State.

Substituting "in cooperation with" for "through" clarifies that the agencies will work together in cases where one agency is not licensed in that state and that agencies are not limited to working only with families in the state or states in which the agency is licensed.

96.33 Budget, audit, insurance and risk assessment requirements

96.33 (e)
In section (e) the regulations require that agencies maintain cash reserves and/or other financial resources to meet its operating expenses for three months. There are cyclical periods of down time in international adoption, especially during the summer months when many foreign countries close for holidays and do not process cases. There are also unforeseen changes in foreign countries, which may result in temporary loss of budgeted income. Reserves tend to go down during these periods and are recouped later.

- Three month's worth of cash reserves is too much for small agencies that are not funded through endowments.
- Secondly, some of the larger agencies that provide state services are frequently not paid for those services on a regular basis due to budgetary constraints. The cash reserve requirement, therefore, could potentially cause these agencies to lose their accreditation through no fault of their own. *(i.e.,* in 2003 some Illinois agencies providing private services had to wait six months or more for payment from the State.)
- Third, requiring cash reserves of this amount would cause an undue hardship on newly established organizations, thus making it difficult for new or potentially new child welfare agencies to work in Hague countries.

Standard business practice for non-profits when dissolving an organization is to sell the organization's assets for distribution to creditors. If the statute's intent was to protect the organization's assets for reimbursing prospective adoptive parents for services not provided, then general assets could be supplemented for cash reserves.

➢ Recommend the following revision:

> (e) The agency's or person's balance sheets show that it operates on a sound financial basis and ~~generally~~ maintains, **on average**, sufficient cash reserves, **assets,** or other financial resources to meet its operating expense for **two** months, taking into account its projected volume of cases. **The agency or person must develop a Risk Management Contingency Plan for the possibility of reorganization or dissolution of the organization, and include provisions for an organized closure and reimbursement to clients of monies paid for services not yet rendered.**

96.33 (g)
We are unclear of the meaning of an "independent professional assessment of risks". If this implies the mandatory use of an independent risk assessment firm, then we would like to voice the following concerns:

A professional assessment of risks does not have to be performed by an independent firm to be completed properly. The risk assessment can be done professionally by a combination of the agency's management, insurance agent and/or financial and legal counsel(s). Requiring review by an independent risk assessment firm would also cause substantial financial hardship by significantly raising the overall costs of accreditation.

Further, during this risk assessment the availability and cost of insurance coverage must be considered. As mentioned previously, it is very difficult to obtain affordable insurance. For example, the quote for Director's and Officer's insurance in Illinois for an agency performing fewer than 25 placements is over $30,000 a year. In some states, D&O insurance is impossible to obtain at any cost. This challenge should not negatively impact the risk assessment nor should the cost of the risk assessment place an added financial burden on the organization.

Finally, as noted in our comments on section **§ 96.39(d)**, due to the lack of clarity regarding the provision that limits an agency's right to contract, we recommend deleting

the last clause referencing "blanket waiver" for purposes of "professional risk assessment".

- Recommend the following revision:

> (g) The agency or person ~~uses an independent~~ **conducts a** professional assessment of the risks it assumes, **and includes the availability of coverage, cost, and the requirements of (h) in this section,** as the basis for determining the type and amount of professional, general, directors' and officer's and other liability insurance to carry. The risk assessment includes an evaluation of the risks of using supervised providers as provided for in § 96.45 and § 96.46 and of providing adoption services to clients. ~~who, consistent with § 96.39(d), will not sign blanket waivers of liability.~~

96.33(h)

Many agencies are reporting severe difficulties in obtaining insurance to meet the requirements of proposed Section 96.33(h). This is exacerbated by the assumption of "tort, contract and other civil liability to the prospective adoptive parents" as proposed in Sections 96.45(c) and 96.46(c) for agencies acting as the primary provider. Our agencies are reporting that their insurance sources are advising them that they will not provide insurance coverage for these added assumptions of liability as primary providers; therefore making this provision unreasonable.

Please consult *Appendix B* for examples of recent insurance quotes, letters from insurance companies, and cases of difficulty experienced by JCICS members.

Considering the current difficulties in obtaining insurance coverage, carriers will certainly resist providing the proposed $1,000,000 in damages for a single occurrence; at a minimum, they would charge exorbitant prices for such coverage. Mandating such a high floor of mandatory insurance coverage would seemingly invite litigation. Since unknown medical and developmental problems are inherent risks in adopting institutionalized orphans through intercountry adoption, this requirement is excessive. We strongly recommend the Department reconsider this requirement which would prove exceedingly difficult for agencies to comply with and would force many agencies or persons to not become accredited, thereby resulting in fewer children being placed.

Additionally, the regulation seems to fail to account for discrete State, "*charitable immunity*", statutes[1], which individual State legislatures have enacted for those qualified, and licensed, organizations within their respective jurisdictions. These statutes have already taken the goals of this particular provision into consideration. The rationale for charitable immunity clauses is to "limit" the amount of recoverable damages for qualified charitable organizations, to guarantee risk exposure for these organizations, and to encourage volunteer Board of Trustees participation by community members, without fear of exposing their personal assets as a result of humanitarian efforts.

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[1] *See*, http://www.nonprofitrisk.org/pubs/sll.htm, (Nonprofit Risk Management Center, 1130 Seventeenth Street, NW, Suite 210, Washington, DC 20036) for a complete downloadable listing of statutory provisions, by State, as well as other 501(c)(3) issues and publications.

As an example, the Maryland charitable immunities statute provides immunity for qualified organizations, in particular their volunteer Board members, if the organization carries liability insurance in the amount of $250,000 per occurrence and $750,000 in the aggregate, with a maximum deductible limit of $10,000 per occurrence. The Maryland legislature has considered and balanced the needs of individual complainants versus the benefits gained to the community through charitable organizations and has determined that $250,000 represents "adequate liability insurance for professional negligence" for matters adjudicated in that State.

- Recommend the following revision:

> (h) The agency or person maintains insurance in amounts reasonably related to its exposure to risk~~, including the risks of providing services through supervised providers~~, but in no case in an amount less than **$250,000** per occurrence**, or more if required by State law.**

If the recommended revision is not adopted, then we respectfully request that a clause be included allowing a grace period of at least six months for agencies to obtain insurance coverage. This would allow agencies to maintain their accreditation status while pursuing alternative means of coverage.

In light of these difficulties, we urge the State Department to use its resources to assist the adoption industry in finding ways to comply with the liability insurance requirements of the International Adoption Act. It is understandable that some insurance companies will not provide coverage for the primary provider framework of liability as proposed in Sections 96.45 and 96.46. We respectfully request that the Department provide direct assistance with insurance for agencies and persons to satisfy the accreditation requirements. Some suggestions include:

- Create a Hague Insurance Commission and have the federal government underwrite the insurance for Hague-Accredited international adoption agencies.
- Identify the number of occurrences covered in a policy year. We recommend no more than three (3) as the limit, as that appears to be a typical ceiling on occurrences.
- Offer or require potential adoptive parents to purchase adoption insurance. This would provide prospective adoptive parents or adoptive parents with another source of monetary relief, other than the sole option of the insurance policy and/or assets of the primary placement agency. This would lessen the adversarial relationship that may arise in event of accident, mistake or unanticipated or undiagnosed (physical, mental, social or medical) problems during or following a specific adoption.

96.35 - Suitability of agencies and persons to provide adoption services consistent with the Convention.

96.35(b)(4) and (5) and (6)
The prescribed ten-year period for which agencies must provide accrediting entities with any disciplinary actions, complaints and investigations is excessively long.

- Recommend that the time period be reduced to five years in all sections.

In addition, the "written complaints" mentioned in section (5) are not clearly defined. We would ask the Department to delineate between frivolous accusations and substantiated complaints so that neither the agency nor the accrediting entity is overwhelmed by unnecessary paperwork.

- Recommend the following revision:

> (5) For the prior **five**-year period, any **substantiated** written complaint(s) against the agency or person ...

Furthermore, we are unclear of the definition of "malpractice complaints" in paragraph (6) and how they differ from written complaints noted in (5). If there is no difference, then we recommend "malpractice complaints" be stricken from regulation (6) since it is adequately provided for in the preceding section.

96.37 – Education and experience requirements for social service personnel.

96.37(d) Credentials of Supervisors

The flexibility of this proposed regulation in permitting supervisors to have professional degrees in social work "or a related human services field" is beneficial to adoption agencies. This allows flexibility in hiring professionals from a broad educational background.

96.37(f) Master's Degree Requirement
Requiring the home study personnel to have a master's degree is unnecessary and unwarranted for the following three reasons.

Scarcity of qualified personnel
If enacted as proposed, this Regulation would severely restrict the availability of qualified home study personnel. In many geographical areas, especially in the more rural parts of the country, few people posses master's degrees, and those who do typically do not have experience or interest in international adoptions.

For example, Open Door Adoption Agency in Georgia recently advertised for a Master of Social Work (MSW) caseworker supervisory position, running ads daily for three consecutive weeks in all five towns within 50 miles of their South Georgia home office. Only 4 MSWs applied, none of whom had the experience or counseling qualifications for the job. However, they received 30 applications with other relevant degrees and experience.

Many master's programs do not specifically address the topic of adoption. Most international adoption professional's experience has come from "on the job" training and while a master's degree can be extremely helpful clinically, it does not ensure a strong knowledge of intercountry adoption or how to prepare a home study.

In South Carolina homestudy providers are Certified Investigators that are licensed by the state of South Carolina. To obtain this license an individual must meet specific education requirements that include a minimum number of hours in adoption training. A

person that has a Master of Social Work degree is not automatically granted a Certified Investigator license to conduct homestudies. They are subject to the same training and supervisory requirements as a person that does not have a Master of Social Work degree. This includes a two year supervisory period where the individual must be under the supervision of a Certified Investigator licensed by the state of South Carolina.

The strict requirement of one particular degree limits the ability of the accredited agency to select home study personnel on the basis of experience, personal sensitivity, moral character and the many other traits necessary to successfully perform their job functions.

Restricts Choices for Prospective Adoptive Parents and Increases Costs
This requirement will reduce the number of choices for prospective adoptive parents in terms of direct service agencies providing home study and post placement services. The increased expense of having to hire MSWs to do home studies would significantly increase the cost of the services, which will result in higher costs to adoptive families.

Inequality in Provisions
Lastly, there appears to be inequality in these provisions. Employees who conduct home studies are required to have a master's degree yet those described in (e) non-supervisory employees who apply other clinical skills and judgment may have a bachelor's degree in any field as long as they also have prior relevant experience. In addition, employees from "exempt" agencies or persons who only perform home studies are not held to this standard.

In light of these positions, we recommend that section 96.37(f) be modified to allow a bachelor's degree personnel to perform a home study but have a master's degree supervisor review and approve the home study.

- Recommend the following revision:

> **96.37(f)** Home studies. The agency's or person's employees who conduct home studies:
>
> (1) Have ~~a minimum of~~ a master's degree from an accredited program of social work education or ; a master's degree (or doctorate) in a related human service field, including, but not limited to psychology, psychiatry, psychiatric nursing, counseling, rehabilitation counseling, or pastoral counseling; **a minimum of a bachelor's degree from an accredited program of social work education; or a combination of a bachelor's degree in another human service field with prior experience in family and children's services, adoption or intercountry adoption;**
>
> **(4) In cases where the home study is completed by an employee with a bachelor's degree, the home study must be reviewed and approved by a supervisor who meets the requirements for supervisors in 96.37(d).**

The current standard in most states is to have a master's degree supervisor review and approve a bachelor's degree personnel home study. This modification would align the proposed rule with the current standard and eliminate the problems outlined above.

If this suggested amendment is not adopted, we would respectfully request that a grand-fathering provision, such as found in (d)(3) of 96.37, be instituted for home study personnel.

- Recommend the following addition if the above recommendation allowing persons with a bachelor's degree to perform home studies is denied:

> (f)(4) An employee who is or was an incumbent at the time the Convention enters into force for the United States will have significant skills and experience in intercountry adoption home studies. The employee will also have regular access for consultation and approval purposes to an individual with the qualifications listed in paragraph (f)(1) of this section.

96.38 Training Requirements for Social Service Personnel

96.38(a)(3)

It is essential that agency personnel have access to and knowledge of adoption laws of other countries. However, at times it can be challenging to obtain the adoption law of another country, especially an official translated copy in English. For example, JCICS attempted to acquire a copy of the Guatemala Constitution in English for reference of the application of international treaties. After a great deal of research, including a request to the Department of State, we were unsuccessful in our search.

The Hague Convention (Article 7(2)(a)) states that Central Authorities shall directly take all appropriate measures to "provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms". As a Central Authority function, it would be beneficial if the Department could support agency's efforts to obtain copies of translated foreign adoption laws and information by creating an accessible resource library. Once this library is established, this provision will be acceptable.

96.38(b)(9)

- Recommend the following revision:

> (9) Child, adolescent, and adult development **as it applies to adopted persons**.

Adding "as it applies to adopted persons" clarifies the appropriate boundaries of this regulation for two reasons: 1) the more general subject of human development would have been included in the provider's professional training, and 2) it would be impossible for agencies to cover it all thoroughly as part of initial employee training.

96.38(c)

- Recommend the training be changed from 20 hours annually to **30 hours over a 2 year period.**

A two-year average of 15 hours per year of continuing education for a two-year licensing period is standard for master's level providers in several states. To require more than a state typically requires could make it difficult for agencies to retain supplementary social workers on a contract labor basis, as many agencies do because of fluctuating demand

for their home study and post-placement employees during the year. We therefore recommend that the training be changed to 30 hours over a two-year period.

96.39(d) Blanket Waivers of Liability

This proposed rule prohibits the agency or person from requiring a client or prospective client to sign a blanket waiver of liability. We are unclear what the Department defines as a "blanket waiver" of liability. JCICS believes that it is imperative to educate the client or prospective client on the various risks associated with intercountry adoption, including but not limited to: unknown or improperly diagnosed medical conditions, uncertainty with foreign government operations and dangers of traveling abroad.

Currently, it is standard practice for agencies to advise their clients that international adoption is not a risk-free endeavor. After acknowledging the possible hurdles and uncertainties, many prospective adoptive parents choose to proceed despite the known obstacles. However, this regulation would appear to alter current practice substantially, and to prohibit adoption agencies from protecting themselves in a reasonable manner. To be able to survive as an organization, agencies must be able to share the risk and to protect themselves contractually from the threat of superfluous litigation by adoptive parent(s). Agencies need to educate their clients about the inherent risks and have the client decide whether or not they wish to proceed. As stated in an article on this topic:

> *In a litigious society such as ours, the ability of an agency to educate prospective parents about the risks of international adoption and then to ask them to accept those risk is indispensable to an agency's ability to carry out its charitable purpose...Put simply, the risks are multiple and known; and absent an ability to require prospective adoptive parents to a voluntarily accept the known risks, agencies may be precluded from their critical mission of finding homes for children.*[2]

Imposition of a statutory prohibition such as that proposed in this regulation is inappropriate interference with a well-justified business practice. This principle has been recognized by various courts that have determined that exculpatory provisions in this precise context are appropriate and consistent with public policy. See *Appendix C* for Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Langue in 'Wrongful Adoption Cases," Boston Bar Journal, May/June 2000 (citing Forbes v. The Alliance for Children, Inc., et al, Suffolk County, Civil Action No. 97-04869B; Regensburger v. China Adoption Consultant ltd., 138 F.3d 1201 (7th Cir. 1999); French v. World Child, Inc., 977 F. Supp. 56 (D.D.C. 1997), aff'd, No. 97-7167 (D. D.C. Cir. Sept. 10, 1998)).

Furthermore, in the DC adoption case of Ferenc vs. World Child (Ferenc, et al, vs. World Child, et al, 977 F. Supp 56, [1997, U.S. Dist. Ct., D.C.], affirmed, U.S. Cir. Ct., D.C. [1998, No. 97-7167]), the Federal Circuit Court for the District of Columbia upheld the validity of contract waiver clauses in service agreements between agencies and potential adoptive parents. Eventually the Court dismissed all of the plaintiff's claims prior to trial, finding in favor of the defendants that there was no fraud or intentional

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[2] Cooper, Howard M., "Enforcement of Contractual Release and Hold Harmless Language in Wrongful Adoption Cases," Boston Bar Journal, May/June 2000.

misrepresentation, and that waiver clauses were valid as a matter of public policy in contract cases. [3]

➢ Recommend the following revision:

> Current provision in 96.39(d) be eliminated and replaced with:
>
> (d) The agency or person **may** require a client or prospective client to sign a waiver of liability in connection with the provision of adoption services in Convention cases, **provided that it specifies in clear language the multiple risks of intercountry adoption and asks the client to voluntarily assume these risks as a condition of receiving services.**

This modification will align the regulation with current practice and encourage the identification and full disclosure of risks to prospective adoptive parent(s). Please consult *Appendix D* for samples of informed risk waivers used by JCICS member agencies.

96.40 Fee Policies and Procedures

> **96.40(b)** Before providing any adoption service to prospective adoptive parent(s), the agency or person itemizes and discloses in writing the following information for each separate category of fees and **estimated** expenses that the prospective adoptive parent(s) will be charged in connection with a Convention adoption.

The references throughout this section should be changed to "estimated" expenses since they have not occurred at this point.

➢ Recommend the following revision:

> **96.40(b)(1)** *Home Study*. The expected total fees and expenses ... or approved person and reviewed and **re**-approved by an accredited agency or temporarily accredited agency;

Clarifying "re-approval" instead of "approval" denotes that the study was approved first by the home study agency as required by state and federal regulations and then is submitted to the accredited or temporarily accredited agency for re-approval.

96.40(f)(3)

➢ Recommend the following revision:

> (3) It provides written receipts to the ~~prospective~~ adoptive parent(s) for **total fees collected directly by the agency** in the Convention country and retains copies of such receipts.

The word "prospective" should be struck from this sentence since by this time the clients are adoptive parents and no longer prospective.

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[3] Jenkins, Carl A., "The Future of Adoption Agency Liability", The Bulletin of the Joint Council on International Children's Services, Winter, 1998/99.

Agencies should only be required to provide receipts for fees that they themselves collected and cannot be expected to give receipts for services which they did not perform. The addition of the phrase "total fees collected directly by the agency" clarifies the agency's accounting responsibility.

96.45 and 96.46 – Using Supervised Providers in the United States and in other Convention Countries.

JCICS is concerned with sections **96.45(b)(8)** and **(c)** and **96.46 (b)(9)** and **(c)** that require accredited agencies to be legally responsible for the acts of their supervised providers. While we understand the Department's intent, there are several problematic consequences.

Families Choice

Frequently prospective adoptive parents decide where they will go for a home study. Often times, placement agencies are approached by families who already have a completed home study in-hand. In these cases, the placing agency investigates the home study provider, ensures that the local agency is licensed, and enters into an agreement if they hadn't done so previously. We make this point to emphasize that accredited placing agencies and home study providers (supervised providers) are not inherently connected except by the families they serve, *at the family's decision*. We would like to make this point clear to correct the misconception stated in Preamble V(c)(6) that the primary provider chooses the supervised provider with whom to work.

Reducing Supervised Providers and Altering the Adoption Community

Accredited agencies acting as the primary provider will choose not to work with supervised providers in order to avoid the required legal responsibility. If accredited agencies no longer contract with local service agencies to perform adoption services, many supervised providers would be forced out of business. This would reduce the home study provider options, especially in more rural areas of the country, for prospective adoptive parents. In Preamble V (c) it states, "The Department also believes that the primary provider requirement will improve practice without unduly changing the adoption community's current structure for providing adoption services." However, this proposed section would have the reverse effect and would unduly change the current structure of the adoption community by undermining the network between placement agencies and local service providers.

Financial Responsibility/ Insurance

Placing agencies already face enormous difficulty obtaining and maintaining insurance (see our comments on section 96.33(h) above). We have heard repeatedly from insurance companies that they would not insure an agency that has legal responsibility for personnel other than their own employees. Again, please consult *Appendix B* for a breakdown of the insurance difficulty faced by JCICS members.

Even if it were possible for an accredited agency to obtain insurance coverage for supervised providers, the coverage would be so costly that primary providers would avoid using supervised providers, choosing only to work with other accredited agencies so as to avoid the economic burden and risk. This goes back to the above argument of creating an environment that would force small agencies performing local services to close their doors.

Ironically, it is the local service agencies that can still obtain affordable insurance since they do not place children and are almost never charged in a lawsuit. This may no longer be true if they are allowed –as in 96.45(d) –to be sued by any accredited agency with legal responsibility for their actions.

Proposed Structure Promotes Litigation

This regulation would place an enormous financial burden on agencies. Most agencies do not possess deep pockets; they are non-profit corporations with inherently limited resources. Non-profit corporations face enough of a challenge in training and promoting responsible behavior, and protecting themselves from the negligence of their own employees without asking them to assume responsibility for local service providers in the U.S. as well as for third party independent contractors in foreign countries.

Agencies are in business to promote the charitable purpose of "unit[ing] children living in terrible conditions in foreign orphanages with parents who want them," Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000 (*Appendix C*). For this reason, the state and federal government have granted such agencies non-profit status so that they can fulfill their important charitable missions.

Non-profit corporations deserve protection from liability. For this reason, some states have enacted statutes that provide non-profits with immunity from liability of its own negligence. For instance, the New Jersey Charitable Immunity statute provides as follows:

> No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees... shall ... be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation ... where such person is a beneficiary, to whatever degree, of the works of such nonprofit...(See e.g. N.J. 2A:53A-7).

Non-profit immunity statutes codify the public policy that ensures that the dedicated staff of not for-profit corporations can accomplish their charitable purpose free of fear from litigation due to negligence. Forcing non-profit international adoption corporations to expressly assume the liability, not only for their own employees, but for supervised providers here and in foreign countries over which agencies have no direct control runs counter to other non-profit policy and law and imposes an unduly heavy burden.

Foreign Supervision

The regulations would further require agencies to assume responsibility for their foreign supervised providers. This is an impractical task. Assumption of liability by primary provider agencies is an ineffective means of accomplishing better oversight.

The same circumstances that necessitate international adoption are the factors that create uncertainty and risk in the process. For example, birthmothers abandon children due to extreme poverty, lack of adequate care and/or the ability to receive and provide care for a child. This often occurs with some degree of sub-standard pre- and post-natal care and possible undiagnosed genetic conditions. The term "abandonment" alone dictates that often very little information may be known about a child's medical history or

genetic disposition. Orphanage workers are usually not skilled, trained medical professionals, but instead well-meaning volunteers or low-paid labor providing basic care only. In many instances, adequate testing to determine accurate levels of physical, development and/or emotional delays is not readily available in third world countries, too cost-prohibitive for under-funded orphanages, or is viewed as an unnecessary expense to waste on the country's unwanted children.

American agencies cannot reasonably be expected to track down every birthmother regarding genetic predispositions, visit every orphanage, and attend every doctor's visit. American agencies' chances of successfully policing their foreign counterparts are extraordinarily difficult to accomplish. Imposing this additional liability on agencies will not assist with agencies' policing efforts nor help to enforce accountability.

American agencies can, however, comply with the other suggestions set forth in section 96.46. Specifically, they can perform a reasonable investigation of foreign contacts, ensure they understand and comply with the policies of the Hague Convention and the general standards of reasonable care and ethical practice. Agencies can further ask foreign contacts to sign contracts whereby they certify to comply with the Hague Convention policies and continue to monitor and train their employees concerning acceptable procedure and practice. Disregarding the liability provisions, the remaining subsections of 96.46 propose a framework for improved supervision and accountability that is acceptable.

Excessive Provisions

With the exception of the risk and liability sections, the proposed rules offer excellent standards, a more rigorous accountability structure, a complaint registry, and disciplinary actions. It would seem that these thorough provisions should be sufficient to monitor the adoption agencies and oversee supervised providers. To unduly alter the adoption community landscape, undermine the network of providers, and put the future viability of local service providers in question seems to be contrary to the Department's stated goal of facilitating international adoption in accordance with the Hague guidelines.

We believe that instead of forcing strict legal liability this proposed rule should focus on exercising due care and a good faith effort to ensure supervised providers are in compliance with the Convention.

- Recommend the following revision:

  Proposed rules 96.45(b)(8) and (c)(1) and (c)(2) and 96.46 (b)(9) and (c)(1) and (c)(2) be struck from the regulations.

- If the above rules are not stricken, then we recommended the following word revisions:

  96.45(c) The agency or person, when acting as the primary provider and using supervised providers in the United States to provide adoption services ~~does the following in relation to risk management~~

  (c)(1) ~~Assumes~~ **Shall not be deemed to have assumed** tort, contract and other civil liability to the prospective adoptive parent(s) **or adoptive parent(s)** for the supervised provider's provision of the contracted

adoption services and its compliance with the standards in this subpart F; and

(c)(2) ~~Maintains~~ Need not maintain a bond, escrow account or liability insurance sufficient to cover the risks of liability arising from its work with supervised providers, **so long as it has a waiver of liability, signed by clients or prospective clients, that clarifies that the supervised provider is a separate entity with which the client has chosen to contract with separately for certain services.**

(c)(2)(d) Reword the current paragraph to read:

(c)(2)(d) **In view of the difficulties many agencies have had in the past with obtaining insurance even for their own corporation, staff and board, primary providers and supervised providers - who are typically brought together in the first instance by a voluntary choice of prospective adoptive parents more than by their own decision - may mutually agree not to pursue any legal claims against each other in connection with their respective provision of adoption services.**

96.46 (b)(9) and (c)(1) and (c)(2) Suggest changes that correspond to the parallel changes in 96.45

96.48 – Preparation and training of prospective adoptive parent(s) in incoming cases.

JCICS members expressed unanimous support for the wide variety of parent training options (in-person and distance learning) that regulation 96.48(d) accommodates. There is great enthusiasm for standardized online courses with certificates of completion, which would assist small, rural agencies and geographically scattered clients immensely. Such documentation would help defend agencies against the allegation that they did not prepare families thoroughly for the intercountry adoption experience.

96.49 - Provision of medical and social information in incoming cases.

96.49 (e)(3) - (5):
While most provisions of 96.49 are reasonable in specifying what medical reports and observation reports on children should include, it also needs to be acknowledged that due to limited medical technology and limited access to information and basic historical data on a child, available medical information is not always thorough or accurate in foreign countries. These three sections request more information than can be reasonably expected in many cases, putting agencies, their representatives and overseas medical practitioners in a difficult situation.

The Central Authority in some countries requires standardized health and social records in adoption cases. In these cases physicians approved by the Convention country are

employed by the Convention country to do an evaluation of the child. This evaluation is usually a summary based on the physician's review of the full medical records and a physical exam. Primary providers have no control over the selection and qualifications of the physician, the items included in the medical summary or the quality of the information provided. The Central Authority, not the primary providers, should be held liable for the accuracy of the information they provide.

Also, many countries legally limit access to personal information on children in order to protect the child's right to privacy. This protection makes it difficult or impossible, in some countries, to have access to the child's history, religious, ethnic and full medical information.

- Recommend the following revisions:

(d) The agency or person itself uses reasonable efforts, or requires its supervised provider or agent in the child's country of origin who is responsible for obtaining medical information about the child on behalf of the agency or person to use reasonable efforts **within the confines of the convention country's laws and procedures**, to obtain available information, including in particular:

(e) If the agency or person provides medical information, **separate from the information provided by the convention country**, to the prospective adoptive parent(s) from an examination by a physician or from an observation of the child by someone who is not a physician, the information **should** include~~s~~ **as reasonable efforts allow:**

(f) The agency or person itself uses reasonable efforts, or requires its supervised provider or agent in the child's country of origin who is responsible for obtaining social information about the child on behalf of the agency or person to use reasonable efforts **within the confines of the convention country's laws and procedures**, to obtain available information, including in particular:

(k) The agency or person does not withdraw a referral until the prospective adoptive parent(s) have had at least a week (unless extenuating circumstances involving the child's best interest require a more expedited decision) to consider the needs of the child and their ability to meet those needs, and to obtain physician review of medical information and other descriptive information including videotapes of the child, **if available.**

96.54 – Placement standards in outgoing cases.

96.54(b)

- Recommend the following revision:

(b) The agency or person demonstrates to the satisfaction of the State court with jurisdiction over the adoption that sufficient reasonable efforts to find a timely **and qualified** adoptive placement for the child in the United States were made, or that making such reasonable efforts was not in the best interest of the child.

It is crucial that this regulation emphasize the need for "qualified" adoptive parent(s), not

just a timely placement.

Subpart K - Adverse Action by the Accrediting Entity
JCICS is concerned that Subpart K does not stipulate a fundamental due process for agencies, which would include notices, standards of proof, hearings and an internal review process, etc. While the regulations go to great length to protect the rights of the adoptive parents, as they should, and to establish a complaint registry and accountability standards; there is not a comparable medium for agencies.

- We would like to see the following instituted in the regulations:
  - Language as outlined in the IAA to be incorporated into regulation 96.76
  - A detailed fundamental due process for agencies including notices, standards of proof, hearings, an internal review process, and information on how cases are handled during an appeal process
  - Additional detail about the transfer of Convention cases

96.76 – Procedures governing adverse action by the accrediting entity
In Section 204(c)(1) of the International Adoption Act it states in paragraph (A) that the Secretary can only temporarily or permanently debar an agency from accreditation if "there is substantial evidence that the agency or person is out of compliance with applicable requirements". In paragraph (B) the Act states that there has also "been a pattern of serious, willful, or grossly negligent failures to comply or other aggravating circumstances indicated that continued accreditation or approval would not be in the best interests of the children or family concerned". We feel that this wording clarifies the circumstances and criteria used to enforce suspension or revocation of accreditation and should apply to accrediting entities as well. Although it is stated in regulation 96.85(b) we would like it repeated in 96.76.

- Recommend that the above wording from the IAA be incorporated into Subpart K to ensure the actions of the accrediting entities comply with fundamental due process.

In addition, a limitation should be included in Section 96.76(b) of the Regulations to ensure that only a child-endangering emergency would permit action to be taken by an accrediting entity without notice. For example, the Regulation might provide that action can be taken without notice only in the case of "clear and convincing evidence of imminent danger to a child."

- Recommend the following revision:

  (b) (2nd Sentence) If the accrediting entity took adverse action but did not communicate with the accredited agency or approved person about the deficiency in advance (such **as a case of clear and convincing evidence of imminent danger to a child**), the accrediting entity must allow the accredited agency or approved person an opportunity after the notice is issued to provide information refuting that adverse action was warranted.

Transfer of Convention Cases

Regulation **96.77(b)** distributes too much power to the accrediting entity. The accrediting entity is empowered to suspend an accredited agency without notice (96.76(b)) and order that its files and cases be transferred to another agency. In addition to the necessity of a detailed appeal process, there also needs to be clear definitions of how an accrediting entity would transfer Convention cases to another agency. We recommend that the procedure be clearly defined to avoid accusations of favoritism by the accrediting entity and to ensure that the prospective adoptive parents have a voice in the transfer process.

Appeal Process

96.78(a) states, "If the accrediting entity takes adverse action against an agency or person, the agency or person must petition the accrediting entity to terminate the adverse action, on the grounds that the deficiencies necessitating the adverse action have been corrected, before it can seek judicial review" (emphasis added). By stipulating that the only way to petition an adverse action is on the grounds that the deficiencies have been fixed assumes guilt. The termination of the adverse action will only occur if the accrediting entity is "satisfied" that there have been corrections. There is no account of a standard of proof, definition of evidence to support, or mechanism to petition the adverse action if it was unfounded or taken improperly. Additionally, there is no time frame prescribed for an agency to be able to seek judicial review when awaiting termination of an adverse action. Agencies need the opportunity to petition the accrediting entity to terminate the adverse action before it is finalized. JCICS requests that due process for agencies be added to the regulations, or at the very least, a mandated internal review process included in the Department's Memorandum of Agreement with the designated accrediting entities.

Subpart L – Oversight of Accredited Agencies and Approved Persons by the Secretary

Regulation **96.82(b)**, states that "when informed by an accrediting entity that it has taken an adverse action that impacts an agency's or person's accreditation or approval status, the Secretary will take appropriate steps to inform the Permanent Bureau of the Hague Conference on Private International Law". Once more, the issue of adverse action without notice is problematic. This provision allows the Secretary to inform the permanent Bureau of the Hague Conference on Private International Law when the party in question has not had an opportunity to appeal the decision from the accrediting entity. There must be a detailed appeal process with notice and hearing in place to ensure the rights of the adoption agencies are protected.

JCICS suggests that the Department create a review committee representing all sides of adoption – adoption professionals, parents, adoptees – to provide advisory services to accrediting agencies.

96.85 Temporary and permanent debarment by the Secretary

JCICS agrees with this provision and is pleased to see that it properly contains language that defines when the Secretary is to take action for debarment.

Subpart M – Dissemination and Reporting of Information by Accrediting Entities

96.96 and 96.98

The eligibility requirements and timeframe listed in these sections provide an opportunity for smaller agencies to reach compliance with the full accreditation requirements. We are pleased that the Department is making this distinction for smaller agencies. As mentioned in *Appendix A*, 53% of JCICS member agencies place under 50 children a year, which could translate to 91 agencies applying for 2-year temporary accreditation.

96.103(b)

This regulation states "the accrediting entity may determine, at its discretion, that it must conduct a site visit to investigate a complaint or other information... the accrediting entity may assess additional fees for actual costs incurred for travel and maintenance of evaluators and for any additional administrative costs to the accrediting entity". This provision is arbitrary in that the accrediting entity, at its discretion, can visit the agency at the agency's expense. Some parameters for "extraordinary cases" need to be clearly defined to protect the agencies from unnecessary fees.

General Comments on the Preamble

In the Intercountry Adoption Act of 2000 (the IAA) at Sec. 2(a)(2), Congress recognizes a "need for the uniform interpretation and implementation of the Convention in the United States and abroad" (emphasis added).

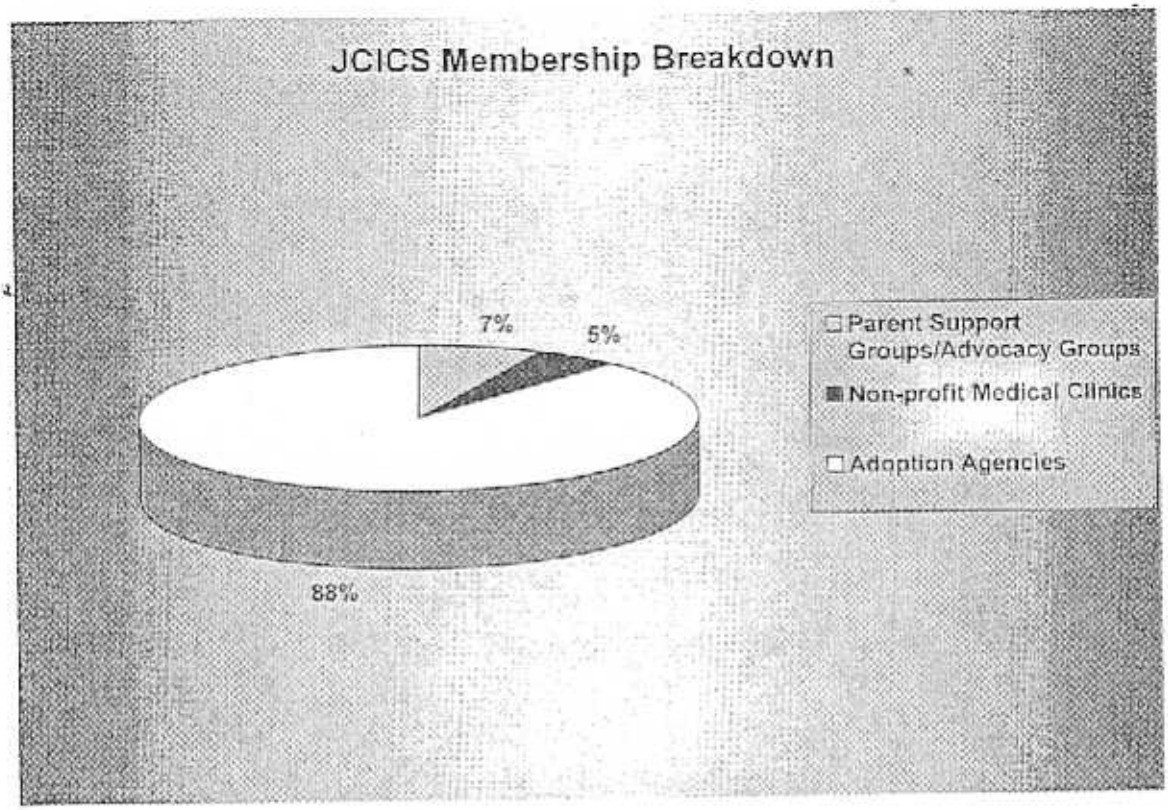
The proposed rules to the IAA understandably focus almost entirely on implementation in the U.S. However, JCICS would like to take this opportunity to address how the Department, as the Central Authority, will advocate for uniform interpretation and implementation in other countries.

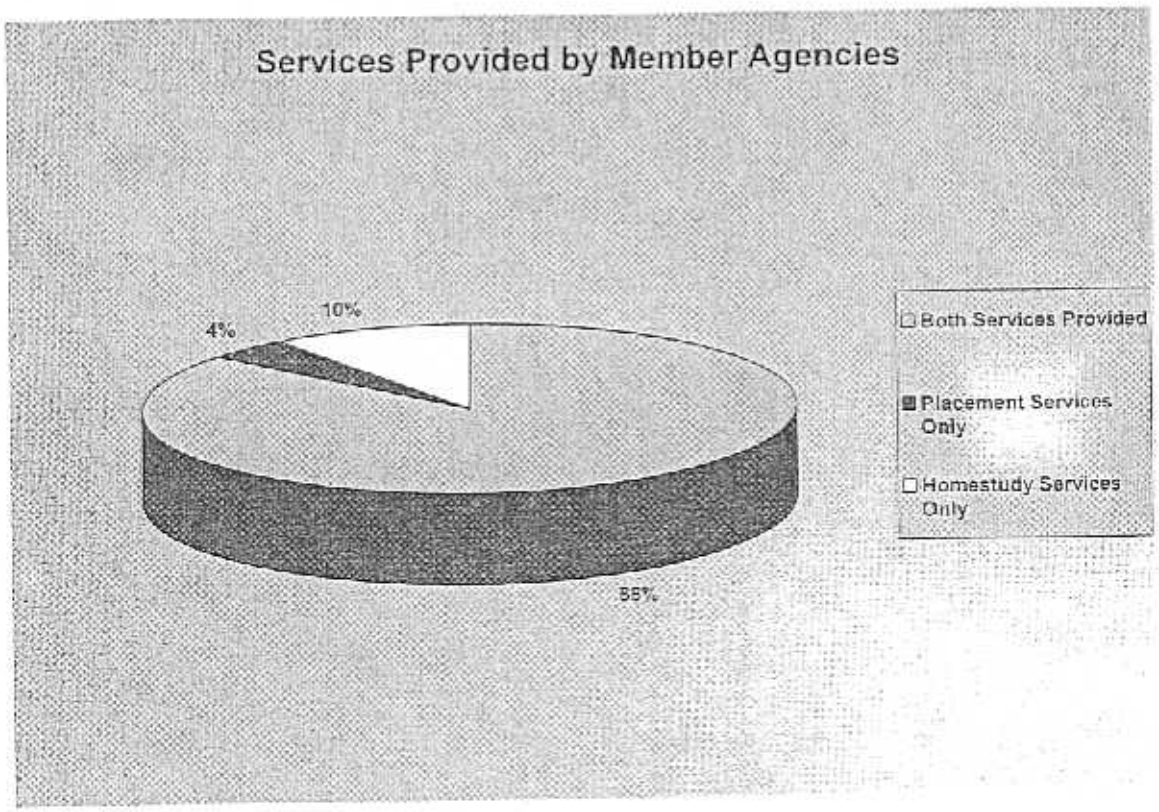
There is significant concern among the international adoption community that the manner in which the Convention has been implemented, or attempted, in many countries undermines the goal of transparency in adoption. It is JCICS' sincere hope that the Department will accept its mandate and assist those abroad, as well as regulate in the U.S. The IAA's three core purposes in Sec. 2(b) are (1) U.S. implementation of the Convention; (2) protection of the rights of children, birth families and adoptive parents while ensuring that adoptions are in the children's best interests; and (3) improving the ability of the Federal Government to assist U.S. citizens seeking to adopt children from abroad. To fulfill this last purpose, we believe it would be extremely beneficial for the U.S. to assume a leadership role as part of its own implementation and serve as a resource and advocate for international adoption in other countries.

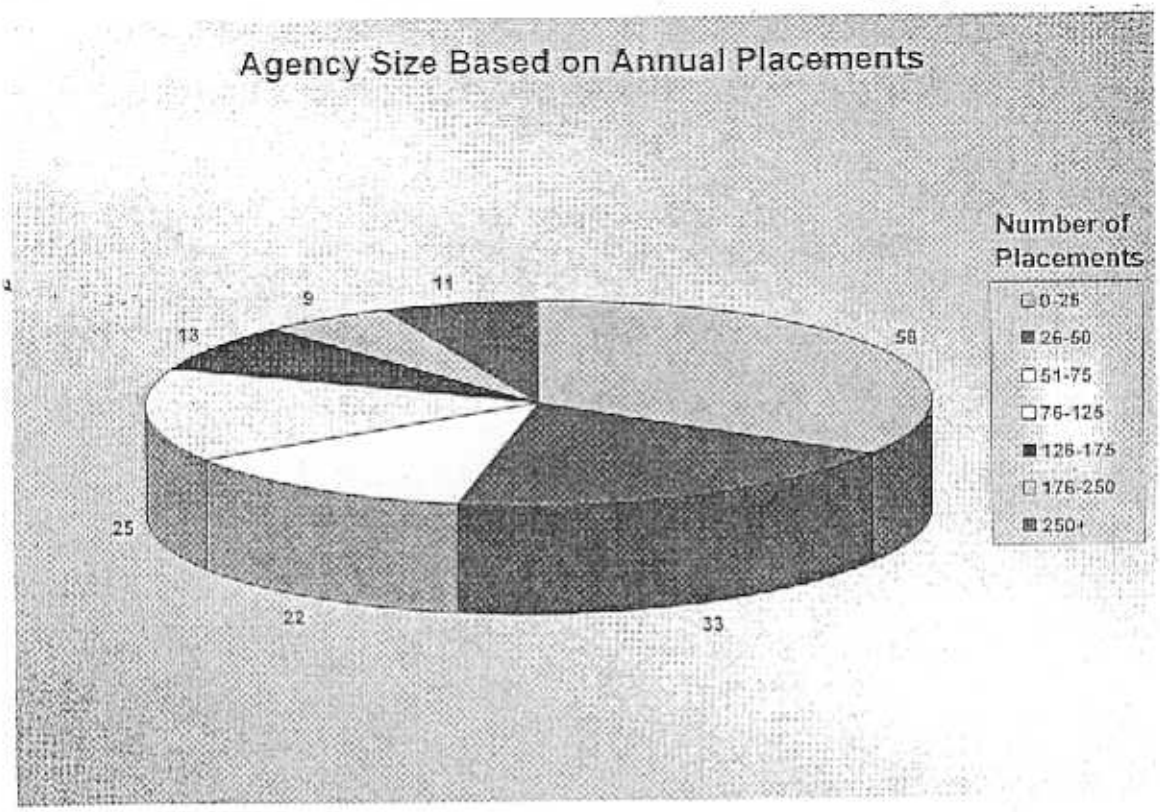
In its resource and advocacy role, the Department should actively investigate and document any alleged adoption abuses and use the Convention as a mechanism for resolving disputes, particularly those between two party countries. Unfounded accusations and rumors of child trafficking have undermined confidence in intercountry adoption. The U.S. should initiate a neutral fact-finding tribunal to investigate adoption abuses between party states and to provide resources for countries seeking to implement or improve implementation in their own countries.

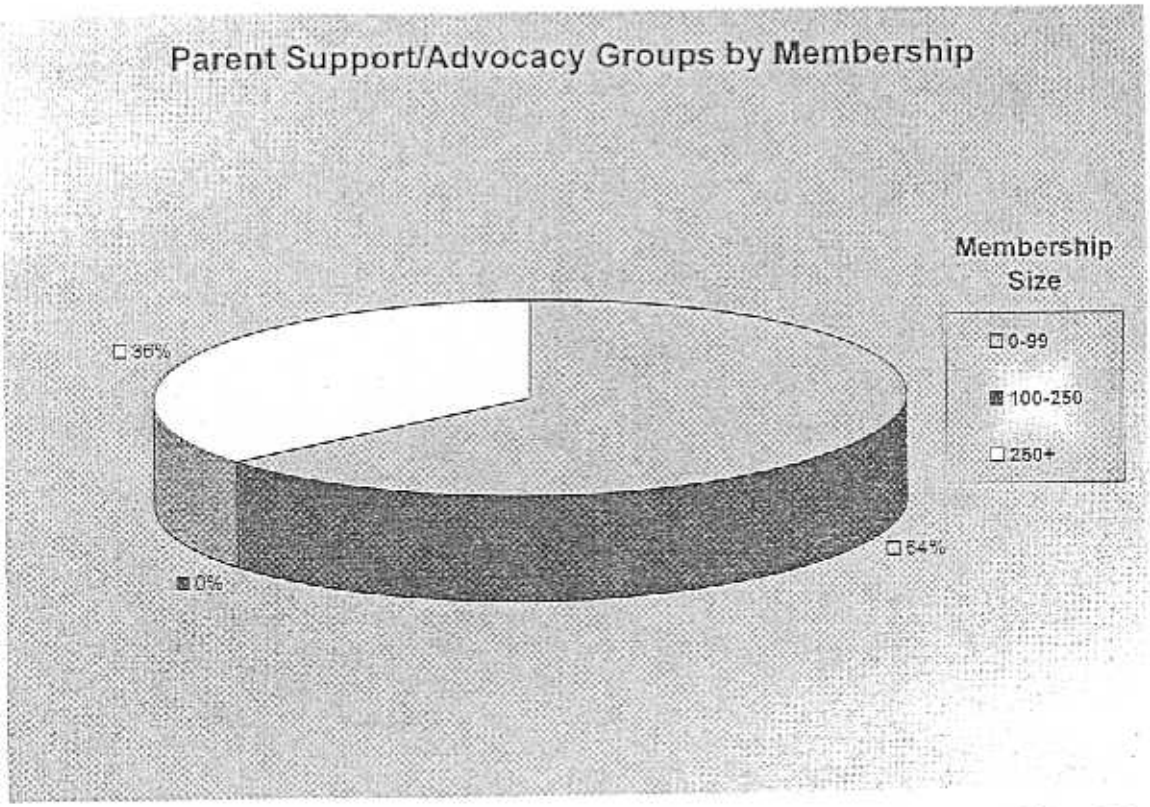
Hopefully, the proposed regulations recognize one of the most critical considerations in child welfare decisions is achieving permanency as expeditiously and inexpensively as possible. The U.S. must guard that its own system does not become a bloated bureaucracy that slows, rather than improves the process of international adoption.

Appendix A: JCICS Membership


JCICS Membership Breakdown
7%
5%
88%
Parent Support Groups/Advocacy Groups
Non-profit Medical Clinics
Adoption Agencies


Services Provided by Member Agencies
4%
10%
86%
Both Services Provided
Placement Services Only
Homestudy Services Only


Agency Size Based on Annual Placements
Number of Placements
0-25
26-50
51-75
76-125
126-175
176-250
250+
11
9
13
58
25
22
33


Parent Support/Advocacy Groups by Membership
Membership Size
0-99
100-250
250+
36%
64%
0%

Appendix B: Insurance

Survey of JCICS members, recent insurance quotes, and letters from insurance companies

Insurance

During the JCICS 2003 annual conference in April, we surveyed the executive directors from our member organizations. The top 3 issues they foresaw for 2003 are changing laws in countries and closings (42%), financial issues (36%) and insurance (34%). The most pressing issue that our members would like JCICS to address in the next year is insurance (40%) followed by the Hague and accreditation (28%).

In October/ November of 2003, in light of the Hague Regulations, we conducted another more informal survey of our members regarding insurance availability. Following are the results from both surveys:

Professional Liability and Litigation Survey - April 2003

Limits of coverage	Deductible	Est. Annual Premium	Yrs of Coverage	Litigation (last 5 Years)	Cost	Ins. Coverage
1,000,000	5,000	$54,000	4	Yes	90,000	Partial
n/a	n/a	n/a	n/a	No	n/a	n/a
1,000,000	n/a	$74,000	5	No	n/a	Partial
1,000,000	n/a	n/a	n/a	Yes	n/a	n/a
n/a	n/a	n/a	n/a	No	n/a	n/a
n/a	10,000	$16,000	15	Yes	350,000	Partial
4,000,000	20,000	n/a	8	Yes	10,000	All
1,000,000	10,000	$17,000	10	No	500,000	Partial
1,000,000	10,000	$30,000	14	No	n/a	n/a
n/a	n/a	n/a	n/a	No	n/a	n/a
1,000,000	5,000	$8,700	20	No	n/a	n/a
1,300,000	5,000	$27,000	3	No	n/a	n/a
1,000,000	n/a	n/a	3	No	n/a	n/a
n/a	n/a	n/a	5	No	n/a	n/a
1,000,000	n/a	$18,000	5	No	n/a	n/a
n/a	n/a	n/a	n/a	No	n/a	n/a
1,000,000	n/a	n/a	1	No	n/a	n/a
n/a	n/a	$36,000	2	No	n/a	n/a
1,000,000	5,000	$9,500	1	Yes	50,000	No
n/a	n/a	$2,800	20	No	n/a	n/a
1,000,000	1,000	$2,000	10	No	n/a	n/a
1,000,000	n/a	$5,000	20	Yes	n/a	All
3,000,000	10,000	$75,000	27	No	n/a	n/a
1,000,000	n/a	$2,500	5	No	n/a	n/a
1,000,000	n/a	$48,000	6	No	n/a	n/a
n/a	3,500	$35,000	15	No	n/a	n/a
1,000,000	n/a	n/a	n/a	Yes	8,000	No
4,000,000	n/a	$4,000	10	No	n/a	n/a
n/a	5,000	$60,000	n/a	Yes	250,000	All
3,000,000	10,000	$38,000	8	No	n/a	n/a
5,000,000	5,000	$95,000	9	Yes	15,000	Partial
1,000,000	2,500	$22,010	5	No	n/a	n/a
4,000,000	n/a	n/a	n/a	No	n/a	n/a
n/a	n/a	n/a	24	No	n/a	n/a
3,000,000	5,000	$16,000	10	Yes	0	n/a
1,000,000	n/a	$3,500	7	No	n/a	n/a
n/a	3,000	$17,000	14	No	n/a	n/a
n/a	n/a	n/a	n/a	No	n/a	n/a
500,000	n/a	$10,000	13	No	n/a	n/a
n/a	n/a	n/a	n/a	No	n/a	n/a
1,000,000	n/a	$3,000	13	No	n/a	n/a
n/a	n/a	n/a	9	No	n/a	n/a
1,000,000	10,000	$9,000	21	No	n/a	n/a
1,000,000	10,000	$6,000	10	No	n/a	n/a
n/a	5,000	$11,000	4	No	n/a	n/a
3,000,000	500	$2,500	13	No	n/a	n/a
n/a	1,000	$6,000	6	No	n/a	n/a
		$763,510	TOTAL			
		$23,860	AVERAGE EST. ANNUAL PREMIUM			

Professional Liability Survey - October 2003		
Insurance Company	*Annual Premium*	*Limits of Coverage*
Admiral Insurance Company	$250,000.00	n/a
James River	$210,000.00	n/a
Philadelphia	$168,000.00	n/a
Admiral Insurance Company	$95,000.00	n/a
Admiral Insurance Company	$90,000.00	5,000,000
NIPC	$85,000.00	n/a
Colony Insurance	$79,000.00	n/a
United National	$19,000.00	n/a
Colony Insurance	$12,737.00	1,000,000
Arthur Gallagher	$8,700.00	n/a
Webster Insurance Agency	$7,219.00	n/a
n/a	$4,137.00	500,000
Lexington	---	refused coverage
Colony Insurance	---	refused coverage
	$1,028,793.00	TOTAL
	$85,732.75	AVERAGE PREMIUM

In April 2003, the average insurance premium was $23,860; however our October 2003 survey reported an average premium of $85,732.75 – a 259% increase. This escalation illustrates the significant increase in insurance costs over the past year. Agencies are facing enormous difficulty in obtaining affordable insurance. If an agency is able to obtain coverage the high costs will be most likely passed through to the adoptive families (see chart below), thereby limiting the number of families financially able to adopt and forcing many smaller agencies to cease operations.

Average Annual Premium	*Divided by number of adoptive families per year*	*Cost per family*
$85,732.75	30	$2,857.76
$85,732.75	75	$1,143.10
$85,732.75	100	$857.33
$85,732.75	200	$428.66
$85,732.75	500	$171.47

Following we have included letters from various insurance companies, including insurance quotes, denial letters and statements that they will not insure supervised providers as defined in the proposed regulations. These letters will accompany JCICS' hard copy submission to the Department and are not included in the electronic version.

Letters from Insurance Companies

MYERS-BRIGGS AND CO., INC.
INSURANCE BROKERS AND CONSULTANTS
125 SOUTH WACKER DRIVE
CHICAGO, ILLINOIS 60606-4401
PHONE: 312-263-3215
FAX: 312-263-0979

November 6, 2003

Ms. Meghan Hendy
Joint Council on International Children's Service
1403 King St.
Suite 101
Alexandria, Virginia 22314

Dear Ms. Hendy,

As you are aware, the current availability of Professional Liability Insurance is extremely limited for agencies involved with international adoptions.

If passed, the proposed Hague Regulations will greatly increase the liability exposure for international adoption agencies with regards to the functions of supervised producers both domestically and abroad even though the agencies have little or no control over how the supervised producers perform their job.

This type of regulation would make the insurance coverage for the adoption agency respond to errors made by such subcontractors as home study agencies who may be hired by the adoptive parents and facilitators in foreign countries.

When an Insurance Company provides insurance they are extremely concerned about any exposures that are unable to be controlled by their Insured. The effects of these unreasonable regulations would further significantly strain the Insurance industry's desire to write insurance for adoption agencies. The few Insurer's who currently provide coverage for adoption agencies would either significantly raise their rates or withdraw from offering coverage completely.

Sincerely,

Bruce Pfaff, CPCU
Executive Vice President

KVIS
Kimberley Vassal Insurance Services, Ltd.

Adoptions From the Heart
30-31 Hampshire Circle
Wynnewood Pa. 19096

Dear Maxine:

As you are aware, the current availability of Adoption Agency Errors and Ommissions Insurance is very limited. After approaching several markets that in the past provided this covrage only 2 are still entertaining this class. It is for this reason that you must continue your strick control over all phases of the adoption process.

The new Hague Regulations if passed will greatly increase your liability exposure for the actions of subcontractors for which you have little or no control over how they perform their job. This type of regulation would make your insurance coverage respond to errors made by such subcontractors as Home Study Agencies who may be hired by the adopting parents and facilitators in foreign countries.

The effects of this type of irresponsible regulations is to put a further strain on the insurance marketplace and the carriers would be forced to either raise rates or withdrawl from this market.

Sincerely,

John Steindl

John Steindl CPCU, AIC

insurance
115 Commons Court · Chadds Ford, PA 19317 · Office: (610) 459-4444 · Fax: (610) 558-0378

ALLAN D. HERSH AGENCY
T & H INSURANCE CENTER
Complete Insurance Service

7870 NORTH LINCOLN AVENUE · SKOKIE, ILLINOIS 60077 · (847) 679-5200 FAX (847) 674-9419

NOVEMBER 5 2003

UNITING FAMILIES FOUNDATION
LYNN WETTERBERG, DIRECTOR
CEDAR VIEW PLAZA
95 W. GRAND AVENUE
LAKE VILLA, IL 60046

RE: COVERAGE TERRITORY, INSURED, & EMPLOYEE DISHONESTY; WITH FIRST NONPROFIT INSURANCE COMPANY.

DEAR LYNN,

THE "COVERAGE TERRITORY" OF THE POLICY IS "THE UNITED STATES OF AMERICA (INCLUDING ITS TERRITORIES AND POSSESSIONS), PUERTO RICO AND CANADA". THIS COVERAGE TERRITORY IS STATED IN THE PROPERTY SECTION PG.15 AND THE LIABILITY SECTION (PG.40) OF THE POLICY.

INDEPENDENT CONTRACTORS ARE NOT INSURED UNDER THE POLICY. THE POLICY DISCUSSES WHO AN "INSURED" OR "NAMED INSURED" IS, BUT DOES NOT DISCUSS WHO AN INDEPENDENT CONTRACTOR IS. SOME "OTHER ENTITIES" CAN BE ADDED TO THE POLICY BUT THESE ARE LIMITED TO LOSS PAYEES, MORTGAGEES, MUNICIPALITIES, PARK DISTRICTS, OR OTHER PUBLIC ENTITIES.

WE HAVE ADDED TO THE EMPLOYEE DISHONESTY COVERAGE, FOR DEFINITION OF AN "EMPLOYEE", BOARD MEMBERS AND NON-COMPENSATED DIRECTORS & OFFICERS. THIS SHOULD SATISFY THE REQUIREMENT OF "BONDING".

SINCERELY,

Allan D. Hersh

ADH/jc

From: John Stromme <JStromme@wsi-insurance.com>
To: lvollman@planlovingadoptions.org <lvollman@planlovingadoptions.org>
Date: Friday, November 7, 2003 1:50:19 PM
Subject: FW: Hi Linda,....I have...
Folder: Inbox/jcics@jcics.org

> -----Original Message-----
> From: John Stromme
> Sent: Thursday, November 06, 2003 3:31 PM
> To: 'lvolman@planlovingadoptionsnow.org'
> Subject: FW: Hi Linda,....I have...
>
>
>
>
>
> Meghan Hendy
> Joint Council On International Children's Service.
> 1403 King Street, Suite 101
> Alexandria, VA 22314
>
> Dear Meghan,
>
> I am the Insurance Agent for Plan Loving Adoptions Now, Inc. As I am sure that you already know, this is a very difficult coverage to obtain for our client. We currently have just recieved a Letter of Cancellation for Plan from Royal Surplus lines Insurance. The letter simply states "Reason for nonrenewal is Underwriting reason". The translation of this is that Royal is no longer comfortable with this type of risk. Companies that are willing to insure this type of risk have declined severely.
>
> I am very concerned about obtaining coverage based on the new regulations proposed. Aquiring coverage will be difficult if even possible. If coverage is obtainable it will most certainly be unaffordable. We currently are remarketing Plan, and doing a dilligent search for a company that will provide this coverage.
>
> In support of my above statements, Western States Insurance has much more market depth than most agencies in the West. If it is difficult for us to obtain this coverage it must be almost impossible for smaller companies.
> Sincerely,
>
> John Stromme
> Commercial Lines
> Western States Insurance
>

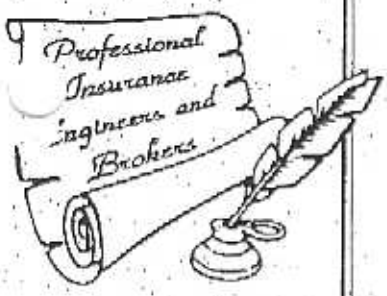
Insurance broker with DeWitt Stern Group in New York.

From: Margaret Ball <MBall@dewittstern.com>
To: 'jcics@jcics.org' <jcics@jcics.org>
Date: Friday, November 21, 2003 1:40:04 PM
Subject: Adoption Agency Error's and Omissions: Meghan Hendy
Folder: Inbox/jcics@jcics.org

Meghan:

Per our discussions as respects the captioned coverage, over the several years that I have been placing Professional Liability (Errors & Omissions) for Adoption Agencies it has become increasingly difficult to secure. The marketplace has not responded well to this class of business and at present will write such risks only on a case by case basis. Coverage for "facilitators" in foreign countries is not available due to the control issue. Premiums continue to increase each year. However, on a positive note, other insurance companies do enter the arena and are willing to write coverage for the agencies from time to time.

Insurance Denial Letters



If it is insurable, we will insure it. . .
tradition of innovation and service"

July 24, 2003

Ms. Sharon Steckler Slotky
Finally Family Adoption Agency
161 West Harrison Suite 102
Chicago IL 60605

Re: Professional Liability Insurance
Applicant: Finally Family Adoption Agency

Dear Ms. Slotky:

I am writing in response to your submission for the above referenced policy of insurance.

Unfortunately, after their review, Underwriters have decided to decline to quote as they feel this is not an exposure they wish to consider.

Thank you again for your submission, but I am sorry that I cannot be of any assistance to you in this matter at this time.

If you have any questions or comments, please do not hesitate to contact me.

Sincerely,

Michael Powell

Michael J. Powell

mpowell@cemins.com

MJP/sd

(25*57)

Complete Equity Markets Inc.

Lloyd's, London Correspondents

1098 South Milwaukee Avenue
Wheeling, Illinois 60090-6398
Phone: (800) 323-6234
Illinois : (847) 541-0900
Fax: (847) 541-0448

Nonprofit Insurance
CANPO ASI

CANPO ADMINISTRATIVE SERVICES, INC.
225 E. 16th Avenue, Suite 100
Denver, Colorado 80203-1614
303/894-0298
303/894-0161 fax
1-800-333-6554 in Colorado Only

August 19, 2002

Virginia Appel
Adoption Alliance
2121 South Oneida Street, Suite 420
Denver CO 80224

Coverage: **Directors & Officers Liability**
Term: **8/5/2002 – 10/4/2002**

Dear Virginia:

Your current insurance carrier, Executive Risk Specialty Insurance Company, has advised us that due to changes in their underwriting guidelines, they cannot offer a renewal policy. They have agreed to offer a 60 day extension of your current policy at the existing rate. An invoice for that premium as well as a copy of the endorsement extending coverage is attached.

We have contacted every other insurance market we have for Directors & Officers Liability coverage and have not found a company willing to offer a quote.

We recommend that you contact the agent that currently writes your Liability coverage to see if they might have a company willing to write your Directors & Officers coverage.

I am assuming that you will also receive a notice directly from Chubb/Executive Risk, but we wanted you to know the situation in time to obtain coverage elsewhere.

If you have questions regarding this, please call me. We appreciate your business and support of the CANPO programs.

Sincerely,
CANPO ASI

J.J. Wilson
Account Manager

Enclosure

Oct 15 03 08:03a The Madara Company 856-273-3663 p.1

THE MADARA COMPANY
Insurance - Founded 1910
Suite 105
3000 Atlantic Drive
Mt. Laurel, NJ 08054-1546
Tel: 856-273-8100 • Fax: 856-273-3643
Email: email@madara.com

IMPORTANT FACSIMILE TRANSMITTAL

TOTAL NUMBER OF PAGES 1

PLEASE DELIVER THIS PAGE AND THE FOLLOWING (0) PAGE(S) TO:

COMPANY: Reaching Out Thru International Adoption Inc.
NAME: Charlene Hutchinson

FROM: Debbie Emmett
DATE: 10/15/03

RE: Professional Liability Insurance &
Directors & Officers Liability Insurance

MESSAGE:

Charlene,

Unfortunately, we have no insurance carriers interesting in quoting Professional Liability for an International Adoption Agency. We received declinations from Evanston, CNA and AIG.

The Directors & Officers Liability quote we provided is only an indication and is contingent upon the required additional information being received and reviewed as noted in our FAX of 9/24/03. When the completed Crum & Forster application, employee handbook, copy of expiring policy loss run, and answers to questions 3,4 & 5 on quote are received, we can provide a firm quote for coverage.

If you have any further questions, please do not hesitate to call.

Debbie

Appendix C: Reference Articles

Reference Articles will accompany JCICS' hard copy submission to the Department and are not included in the electronic version.

Enforcement of Contractual Release and Hold Harmless Language in "Wrongful Adoption" Cases

by Howard M. Cooper

There has been a relative explosion of litigation nationally in which plaintiff/parents are pursuing claims against adoption agencies and their staffs for "wrongful adoption." A recent article in the Wall Street Journal reported that "In a growing number of lawsuits, parents are claiming that adoption agencies intentionally misrepresented their children's medical histories or negligently failed to disclose important information."[1] The article pointed out that "Passions run high in these cases. Often, they ... involve parents whose emotions were already rubbed raw by not being able to have their own children. Many then faced a legal obstacle course to adopt. Gradually realizing that their long-awaited child has physical or mental problems can be the last straw, emotionally. What's more, to prove their claim, parents must often argue that they would not have adopted the children if they had known the truth."[2]

Central to these cases is the emerging issue of whether parents can be held to agreements made in advance of an adoption in which they acknowledge the risks of adoption, agree to accept those risks, and hold the agency through which they are adopting and its staff harmless against any negligence claims. At stake from the agency's perspective, is whether the agency can protect itself and its workers, who must carry out their work in a litigious society, against widely recognized risks so that it can fulfill its charitable, non-profit mission of uniting children living in sometimes horrific conditions with parents who want them. One recent Massachusetts decision, *Forbes v. The Alliance for Children, Inc., et al*, Suffolk County, Civil Action No. 97-04860-B, held that such agreements are enforceable and do not violate public policy.

Consider the hypothetical case of John and Mary Doe. The Does spent several years going through fertility treatments that included invasive medical procedures, frequent and painful injections, and repeated and profound disappointment and loss at not being able to produce a biological child. After counseling, the Does decide to adopt. Because of their concerns about privacy, their fear of a biological parent appearing unannounced in their lives at a future date, and their desire to adopt a baby quickly, the Does decide to adopt internationally from a former Eastern bloc country.

Excited about the prospect of finally being parents, the Does apply to an agency specializing in international adoptions from orphanages in Eastern European countries. After a few months, which include a home study and the furnishing of extensive information about themselves and their suitability as parents, the Does receive a photograph of their assigned child. They immediately fall in love with the child in the picture; their prayers finally answered. The Does are also given a two page medical history of the child, translated into English by the agency. This is the only medical information authorized by the country from which they are adopting. The medical information is sparse, but appears to indicate a healthy baby. The Does furnish a room in their house for their new baby and pack their bags for a trip overseas.

Howard M. Cooper is a founding partner of Todd & Weld, a Boston trial practice firm. The author concentrates in complex civil litigation and criminal defense.

For its part, the adoption agency through which the Does are adopting is a not for-profit corporation founded and staffed by dedicated personnel. The agency's stated, charitable purpose is to unite children living in terrible conditions in foreign orphanages with parents who want them. Agency employees have visited the orphanage and are aware of their difficult conditions, the typical problems of developmental delay exhibited by practically all orphanage children, the political sensitivities of foreign governments who have large orphanage populations and, most importantly, the limited and often incomplete family and medical information available about orphanage children (some of whom literally are abandoned at the orphanage door).

The agency also knows that sometimes things can go wrong. A child thought to be available, at the last minute is unavailable. A child thought to be healthy, later turns out to have a previously undetected or undiagnosed medical condition. Despite repeated attempts to obtain additional information and to open up the foreign process, agency workers and representatives are thwarted in their efforts by foreign governments which strictly regulate the agency's access to the orphanage, and to information about the children available for adoption. Yet, the needs of the children are the agency's driving motivation; the agency is dedicated to finding them homes no matter how difficult the process.

Accordingly, the agency asks each parent who adopts through it to acknowledge and accept up front the risks inherent in the process. In particular, the agency asks each prospective adoptive parent to sign a Medical Release Form. In that form, each parent accepts in writing the risk of any "unknown or undetected condition. Each parent also releases and agrees to hold the agency harmless for any future medical problem with the adopted child. Finally, the agency counsels the family that if they encounter any problem with the child while overseas they are not obligated to accept the placement.

The Does arrive in the foreign country. Eager to meet their child, they quickly travel from a capital city to an outlying village where the orphanage is located. There they are introduced by non-English speaking orphanage personnel to their baby. For a few moments their dream is realized. They are parents. They and their child are a family.

Within days, however, the Does find their child not

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"normal." Something seems wrong beyond the typical problems of orphanage children they have been told to expect. However, they do not, and emotionally cannot, even consider going home without their baby. They come back to the United States. They begin to make the rounds of physician visits. Ultimately, they are informed that their child has a severe and permanent medical problem. The Does feel lied to and victimized. Their dream becomes a nightmare of doctor visits and financial drain. Despite their signatures on legal documents explicitly accepting precisely the risk of a child with an undiagnosed or undetected medical problem, they feel strongly that this is not what they bargained for and that the agency somehow should have done more to protect them. Exhausted, the Does consult with legal counsel and file a lawsuit. The agency counters by pointing to the Medical Release Form and other documents which the parents signed in advance of the adoption. The agency moves to dismiss the complaint.

According to at least one Justice of the Massachusetts Superior Court, the release and hold harmless language of the Medical Release Form signed by the parents in advance of adopting bars their claims against the agency for negligence, and such contractual arrangements do not violate public policy.

In analyzing facts before her very similar to the above hypothetical, Judge Margaret R. Hinkle addressed this precise issue of first impression in Massachusetts in *Forbes v. Alliance for Children, Inc. et al.*, Suffolk Superior Court, Civil Action No. 97-04860-B (Dec. 16, 1998). In her opinion, Judge Hinkle recognized first that it is settled law in Massachusetts, "that traditional tort principals apply to the relationship between adoption agencies and potential parents during the adoption process" citing *Mohr v. Commonwealth*, 421 Mass. 147, 163 (1993). In *Mohr*, adoptive parents brought suit against the Commonwealth of Massachusetts and its social workers, alleging that the defendants negligently failed to provide accurate and complete information about their daughter's background, "particularly her medical and family history, as well as her probable needs for future treatment and care ..."[3] The parents alleged that the defendants failed to disclose to them available records indicating that their daughter's birth mother had been diagnosed with chronic schizophrenia, requiring a commitment to a state hospital, that their daughter's early infant development had been "stunted," and that she had been diagnosed with "cerebral atrophy."[4] A jury returned a verdict in the plaintiffs' favor in the amount of $200,000. The Commonwealth appealed.[5]

On appeal, the Supreme Judicial Court in *Mohr* considered whether Massachusetts should recognize a cause of action in tort which would allow adoptive parents the right to compensatory damages against an adoption agency for the agency's negligent misrepresentation of facts prior to the adoption concerning the adopted child's history.[6] The SJC surveyed case law from other jurisdictions and noted that many courts already recognized a cause of action for "wrongful adoption" based upon an agency's intentional misrepresentations to parents prior to adoption.[7] Accordingly, the SJC held that "We agree that the straightforward application of well-established common law principles support recognition of a cause of action in tort for an adoption agency's material misrepresentations of fact to adoptive parents about a child' history p or to adoption."[8] The SJC went further, howe er, holdi g that the tort of "wrongful adoption" encompa sed *both* ten- tional *and* negligent misrepresentation c aims.[9] Th SJC noted that pursuant to 100 Code Mass. R egs. Sec. .213(3) (1984) an adoption agency has "an affir ative dut to disclose to adoptive parents information bout a c ld that will enable them to make a knowledgea le decisi about whether to accept the child for adoption "[10] As a r sult, an agency's negligent failure to disclose av ilable in rmatio could render it liable in tort to the adop ive parent

In light of *Mohr*'s clear holding that Massachu etts law allows plaintiff/adoptive parents to hold n adopti n agency liable in tort for its negligent m srepresen tions about a child's medical status, Judge Hi kle then fronted the issues of whether a plaintiff s negligen claims could be barred by contractual r lease doc ments signed in advance of the adoption and whether th enforcement of such release and hold har less lang would run afoul of public policy.[11] Jud ge Hinkle first set forth the relevant release language at is ue contai ed in three (3) separate documents signed by the plain ts:

> In consideration of [Agency] undert ing to as st us in seeking to adopt a child from an her coun y, we agree to indemnify and hold ha nless [Ag y], its Directors, Officers, representativ s, and em oyees, from any problems or liability. We unde stand that [Agency] nor any of its repres tatives ca guarantee the future medical condit n of this ld. Therefore, the Adoptive Parents agr e not to h ld [Agency] or any of its representativ s respons le for any medical condition which mi ht develo or be discovered in the future.
>
> We have read and understood the sks, neve theless, it is our desire to go forward with the a tion process.
>
> * * *
>
> We do hereby release, indemnify nd hold harmless [Agency], its directors, o icers, rep sentatives, and employees should a c ld be dia nosed as being HIV, having or suf red from AIDS or AIDS related complex, from He atitis B, o any presently undiagnosed and untest l medical condition or illness regardless of i severity
>
> We agree to hold [Agency] harmles for any ill ss the child may have or acquire and t e conseq ces of such illness or for the child's dea resulting fro such illness. Furthermore, we unde tand that neither [Agency] nor any representa ve can gu an tee the future medical condition of its child. Therefore, we agree not to hold [Ag ncy] or a of its representatives responsible for an medical conditions presently undiagnosed or untested h might develop or be discovered in e future.
>
> * * *
>
> Upon completion of the above ob gations [Agency], we agree to indemnify nd hold harmless [Agency] and release its irectors, officers, representatives and empl yees fro all liability and damages arising out , or asso ated

Continued on page 27

(b) Alimony. The issue is whether a claim for alimony, preserved under Section 522(c), is enforceable by forced sale of homestead property in contravention of a state law prohibiting this remedy. In the Fifth Circuit Court of Appeals case of *Davis v. Davis*, the debtor filed for bankruptcy, whereupon his ex-wife pursued and obtained a judgment from the Bankruptcy Court that her claim for alimony, child support and maintenance was nondischargeable under Section 523(a)(5). The ex-wife then sought to enforce her judgment by foreclosing on the debtor's homestead, and the debtor protested on the grounds that the Texas homestead law provided an exemption of property from seizure and sale to satisfy the debtor's alimony and child support debts. The Court held that the ex-wife was entitled, under Section 522(c)(1), to enforce her nondischargeable judgment, but that the remedies available to her were governed by Texas collection laws because "Sec. 522(c) is not an execution statute and does not preempt relevant Texas law." The Court noted that the U.S. Congress could alter this situation by enacting a federal execution statute, but that until that time Texas's enforcement mechanisms controlled. The *Davis* ruling is consistent with the First Circuit's decision in *Weinstein*, and there is no reason to believe that a Massachusetts Court would rule differently given the same circumstances.

IV. Conclusion. Because some provisions of the Act are ambiguous, while others conflict, the Act is, in some respects, unknowable. The irony of this confusion is that the purpose of the Act is simple - protect the family home from creditors. First enacted in 1851, the Act was amended 11 times before being rewritten in 1977, and has been amended 17 times since then. These are not the vital statistics of a healthy statute. Many of these amendments failed to solve existing problems or created new problems. At the dawn of the 21st century, we are left with a 19th century statute, with a few 20th century bells and whistles. It's ugly, clumsy, even embarrassing – and it just doesn't work. The baby is long gone; let's throw out the bathwater. This proposal is necessary because, in a very real sense, there currently is no Massachusetts homestead law: the Act is unintelligible or silent on many issues and the vast majority of the cases are coming out of the Bankruptcy Court, not state courts.

The Act should be replaced and the new statute should:

1. make homestead protection automatic, without any filing requirement or, barring this, make filing relate back to the date of purchase;
2. expressly provide for joint filing;
3. provide that a creditor may force the sale of the property in order to liquidate the equity in excess of the exemption;
4. shield sale proceeds of homestead property for a limited time so that the owner may reinvest the proceeds into a new homestead;
5. provide that a replacement homestead or change of election for an existing homestead (assuming the three types of homestead are retained) relates back to the time of the original homestead;
6. make homestead protections under the Act cumulative;
7. provide that a surviving spouse may terminate the homestead interest of minor children without having to have a guardian appointed.

With these suggested changes incorporated into the Act, it would be, on or about the sesquicentennial of its enactment, better than new.

ENDNOTES

1 Mass. Gen. L. ch.188
2 21 Massachusetts Practice (Probate Law and Practice) §7.6 at p.99 (1997)
3 5 Massachusetts Practice (Methods of Practice) §294 at p.311 (1991)
4 Land Court Guidelines to Registry Districts
5 14B Massachusetts Practice (Summary of Basic Law) §17.1 at p.672 (1996)
6 Mass. Lawyers Weekly, March 31, 1996, p.2
7 Thompson on Real Property §21.03(a) at p.15 (D.A. Thomas ed. 1994)
8 1 American Law of Property §5.75 at p.810 (A. J. Casner, ed. 1952)
9 Act of Jan. 26, 1839, [1838-1840] Laws of the Republic of Texas p. 133
10 St. 1851, c.340 §§1, 4
11 Harold Lavien and Judy K. Menchel, *The Escape of Massachusetts Tenancy by the Entirety and a Reappraisal of Homestead: How They Relate to Bankruptcy*, Mass. L. Rev., Winter 1992, pp.176-
12 28 Massachusetts Practice (Real Estate Law) §5.9 at p.151 (note 1) (1995)
13 40 Am Jur 2d, Homestead §4 at p.254 (1999
14 George L. Haskins, *Homestead Exemptions*, 63 Harvard Law Review 1289-90 (1950); also 40 Am Jur 2d, Homestead §4 at pp.253 254 (1999)
15 *Supra* note 12
16 Mass. Gen. L. ch.188 §2
17 *Supra* note 8, §5.84 at pp.832-833
18 Haskins, *supra* note 14, at p.1301
19 *Supra* note 12
20 Mass. Gen. L. ch.188 §1
21 Mass. Gen. L. ch.188 §1
22 See *Dwyer v. Cempellin*, 424 Mass. 26, 673 N.E.2d 863 (1996)
23 *In re: Cempellin*, 175 B.R. 1 (Bkrtcy. D. Mass. 1994)
24 Jordan B. Cherrick, *The Homestead Act: An Important Law to Protect the Family But a Law in Need of Reform*, Mass. L. Rev., Vol. I October 1980, p.178
25 Mass. Gen. L. ch.188 §7
26 5 ALR 4th (Contract to Convey Homestead - Signature) §7 at p.1312 (1981)
27 Mass Gen. L. ch.188 §7
28 Mass Gen. L. ch.188 §8
29 *Atlantic Savings Bank v. Metropolitan Bank & Trust Co.* 9 Mass App. Ct. 286 (1980)
30 See *In re Ciarrizzo*, 128 B.R. 321 (Bkrtcy. D. Mass. 199)
31 Mass. Gen. L. ch.188 §2
32 21 M.L.W. 863 (January 25, 1993)
33 5 Massachusetts Practice (Methods of Practice) §294 at p.311 (1991)
34 Haskins, *supra* note 14, at p.1314
35 Mass. Gen. L. ch.209 §1A
36 Lawyers Weekly No. 14-035-99
37 Massachusetts Collection Law, at §9.52 (Dorothy L. Shapiro, Marc S. Perlin and John M. Connors (1992))
38 164 F.3d 677 (1st Cir. 1999)
39 170 F.3d 475 (5th Cir. 1999)
40 233 B.R. 11 (Bankr. D. Mass. 1999)

"Wrongful Adoption" Cases

Continued from page 13

> with the placement of the child in the home of the Adoptive Parents. Furthermore we understand that neither [Agency] nor any of its representatives can guarantee the present or future medical condition of the child. Therefore, we agree not to hold [Agency] or any of its representatives responsible for any medical conditions which might develop, or be discovered in the future.[39]

After reviewing this language, Judge Hinkle determined that "early in the adoption process, plaintiffs agreed that they read, understood and acknowledged the risks of international adoption and agreed to indemnify and hold

Continued on next page

"Wrongful Adoption" Cases

Continued from page 27

e Agency] harmless[.]"[13] The Court noted that the release and hold harmless language was neither in small print nor concealed within a lengthy form, and that the language was "comprehensive in scope, covering present and future conditions and known and undiscovered conditions."[14]

The Court then turned to the plaintiffs' contention that enforcing the contract language would violate public policy. The Court first reviewed regulations promulgated by the Office for Children, 102 C.M.R. §5.00 *et seq.*, prohibiting a licensed agency from knowingly and willfully making false statements to prospective adoptive parents (§5.04(8)), and requiring disclosure of certain information to prospective adoptive parents, (§5.10(9)).[15] The Court concluded that the plaintiffs had offered no evidence of any willful breach of the regulations, which by their terms are directed at intentional misconduct.[16] The Court then concluded "These regulations fail to directly support plaintiff's conclusion that public policy precludes allocation of risk by agreement between an adoption agency and prospective adoptive parents in the international adoption context."[17] Instead, the Court adopted the view that "public policy is well-served by allowing ... plaintiffs and [agencies] to allocate the inherent risks of international adoption in order to facilitate such adoption."[18] The Court also noted that two other jurisdictions have upheld exculpatory contract provisions in the context of wrongful adoption suits resulting from international adoptions.[19]

Accordingly, under the reasoning of *Forbes*, a Massachusetts agency can protect itself against lawsuits by entering into contracts with prospective adoptive parents, clearly and in writing, stating that the prospective parents have been educated about the inherit risks of international adoption and providing that the parents have nevertheless agreed to go forward while holding the agency and its workers harmless.

The *Forbes* decision appears to have generated controversy in the adoption field. Advocates for adoptive parents and many attorneys who regularly practice in the area maintain that it is inherently unfair and legally incorrect to treat the adoptive parent/agency relationship as a commercial transaction. They point to the unique nature and subject matter of the relationship between prospective adoptive parents and an adoption agency. They also point to the obvious vulnerability of prospective adoptive parents who often are emotionally desperate to adopt and presumably less prepared to be critical of information received from agencies. In so doing, these advocates suggest that any person undertaking the emotional process of adopting should be afforded extra protection from abuse and misinformation, and should not be subject to ordinary principles of contractual risk allocation.

No doubt the considerations and arguments raised by parent advocates are real and legitimate. However, they represent only part of the overall picture relative to international adoption. United States-based adoption agencies engaged in facilitating international adoptions do not have meaningful control over the foreign adoption process, the orphanage systems of foreign countries, or the medical care of the children available for adoption. In many foreign countries where children are available for adoption, health care systems and training, record-keeping, and legal surrender procedures, to name just a few items, do not even remotely approach or resemble Western standards.

It is also widely recognized that infants and young children living for any length of time in an orphanage almost uniformly suffer from some degree of developmental delay resulting from a lack of one-on-one stimulation. As a result, orphanage children are already expected to exhibit some degree of problems, and the ability to differentiate between typical and expected developmental delays, and more severe and permanent medical problems is often difficult, if not impossible.

So too politics plays a role. After the fall of the communist dictatorship in Romania, for example, western media swarmed into ill-equipped and backwards Romanian orphanages in order to broadcast back to western countries horrible images of rows of cribs containing infants infected with HIV. This caused an embarrassed Romanian government to make it unofficial "policy" for years not to allow agencies even to bring video cameras into orphanages in order to take video of infants and toddlers available for adoption.

In countries with emerging economies, cash payments and "gifts" at various stages of the adoption process are often an ordinary part of doing business. To a foreigner, however, such payments may appear to be the hallmark of a corrupt process which is difficult to understand and even harder to penetrate when attempting to get more information.

As a result of all these factors, the ability of an adoption agency to obtain and furnish available records and medical information in connection with an international adoption is not comparable to what is possible in the context of a domestic adoption. These real world differences must be recognized. In a litigious society such as ours, the ability of an agency to educate prospective parents about the risks of international adoption and then ask them to accept those risks is indispensable to an agency's ability to carry out its charitable purpose.

This real world context is the appropriate lens through which to view Judge Hinkle's decision in the *Forbes* case, as well as decisions from other jurisdictions which have upheld exculpatory contract provisions and thereby allowed agencies to allocate the risks inherent in international adoption. Put simply, the risks are multiple and known; and absent an ability to require prospective adoptive parents to voluntarily accept the known risks, agencies may be precluded from their critical mission of finding homes for children.

ENDNOTES

1 Wall Street Journal, December 7, 1998, "Are Adoption Agencies Liable for Not Telling All?"
2 *Id.*
3 *Id.* at 148.
4 *Id.* at 152-153.
5 *Id.* 148.
6 *Id.* at 156.
7 *Id.* at 158.
8 *Id.* at 159.
9 *Id.* at 161.
10 *Id.*
11 *Forbes v. Alliance* at p.12.
12 *Id.* at pp. 13-14.
13 *Id.* at 14.
14 *Id.* at pp. 14-15.
15 *Id.* at 18-19.
16 *Id.*
17 *Id.* at 19.
18 *Id.* at 18.
19 *See Regensburger v. China Adoption Consultants Ltd.*, 138 F.3d 1201 (7th Cir. 1998); *Ferenc v. World Child, Inc.*, 977 F.Supp. 56 D.C. 1997) *aff'd*, No. 97-7167 (D. D.C. Cir. Sept. 10, 1998).

TODD & WELD LLP
ATTORNEYS AT LAW
28 STATE STREET
BOSTON, MASSACHUSETTS 02109

HOWARD M. COOPER
Email: hcooper@toddweld.com

TELEPHONE: (617) 720-2626
FACSIMILE: (617) 227-5777
www.toddweld.com

October 31, 2003

Via E-mail - adoptionregs@state.gov
and First Class Mail

U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket Room
SA-29
2201 C Street, NW
Washington, DC 20520

RE: **Docket Number State/AR-01/96**
Proposed Amendments to the Hague Convention:
Subpart F, page 54100, 96.33(h) – Financial and Risk Management
Subpart F, page 54102, 96.39(d) – Blanket Waivers of Liability
Subpart F, pages 54105 and 54106 – Using Supervised Providers in the United States and in other Convention Countries

Dear Sir/Madam:

I write respectfully in vigorous opposition to the above proposed amendments to the Hague Convention. As discussed below, both separately and in combination, it is difficult to conceive of a set of proposed regulations which would more undermine the well-established goals of international adoption (i.e., uniting children born in foreign countries into difficult and often dangerous circumstances with adults living in other countries who desire and are prepared to parent them).

By way of background, I am the father of a 20 month old little girl adopted from Colombia. My family has been through the international adoption process. I spent nearly 5 weeks last year in Bogotá, Colombia navigating, with the assistance of an international adoption agency, a difficult foreign bureaucracy in order to bring my daughter home. I am also a trial lawyer who has represented international adoption agencies in "wrongful adoption" cases. I am the author of an article which appeared in the Boston Bar Journal (May/June 2000 edition) entitled "Enforcement of Contractual Release and Hold Harmless Language in 'Wrongful Adoption' Cases." (I enclose a copy of the article). I am also Chairman of the Board of the Alliance for Children Foundation, Inc., a Wellesley, Massachusetts based non-profit Foundation which raises money to support children living in orphanages in foreign countries and,

importantly, the many children who are left behind because there are no prospective a optive parents interested in adopting them.

Let me address the above proposed amendments in order.

The proposal to require adoption agencies to maintain a minimum of $1 millio in liability insurance is unrealistic and misdirected. It is already extremely difficult for a gencies even to get insurance. I am aware of only two insurers who are willing to write this ri k. Once an agency has received a claim, they typically are cancelled for the following year. E en wher insurance can be obtained, the cost is exorbitant. I am aware of an agency which pay: over $65,000 per year for $1 million worth of coverage. To the extent this cost can be pas: ed on to prospective adoptive parents in an agency doing, for example, 200 adoptions a year, t is adds a average additional cost to an adoption of $325. This is a substantial increase in fees v hich negatively impacts upon the number of people able to adopt and, in turn, the number f childre who will be adopted.

Most agencies are non-profit entities. Accordingly, the requirement that they bsorb th cost of mandated insurance impacts their ability to perform their charitable purpose, r t their profits. Indeed, to encourage adoptions many agencies already utilize a sliding scale f fees pursuant to which lower income couples can pay less for an adoption. The agencies a bility to this will be directly impacted by the requirement of maintaining $1 million in insuran e coverage. It is difficult to conceive why the State Department would be in favor of in posing such a prohibitive administrative cost on a non-profit entity engaged in a charitable u dertakin .

The proposal to prohibit contractual assignment of risk agreements too is mis laced an frankly, ill conceived from a public policy perspective. As a threshold matter, courts onsideri such agreements have explicitly upheld the public policy of allowing agencies engage d in the difficult work of international adoption to educate their clients to the well-established risks and asking them to acknowledge and accept that risk. In Forbes v. Alliance for Children, a Massachusetts Superior Court decision upholding a risk acknowledgment and waiver agreeme t the Court explicitly recognized that there are risks inherent in adopting a child from a other country, especially the unknown and unknowable medical risks at issue in that case, a id that without such agreements the important work of international adoption agencies could not go forward. I enclose a copy of the decision.

As the parent of both an adopted child and a biological child it is difficult to u derstand why someone who wants to adopt a child from another country is entitled to a de fact guarant e that the child will be physically and emotionally healthy where no such guarantee exi ts with regard to biological children. This would be the net effect of barring assignment of ri k agreements.

Keep in mind that no contractual waiver agreement is ever enforceable in inst nces of fraud or bad faith. As a result, the amendment can only be viewed as being directed barring agency from protecting itself against unintentional mistakes regarding issues which n ght very

well be inherently unknowable. For example, agencies typically advise prospective ac optive parents that children living in orphanages may be delayed developmentally due to a la k of stimulation. Such delays can mask a variety of conditions. Children available for ado tion literally may have been left at an orphanage with no medical information about them r their biological parents. There may be no ability to evaluate a child in an orphanage before an adoption given the lack of a modern medical system in the host country or local burea ucracy. These are just examples. The point is that prospective adoptive parents can be (and ty ically a educated to these risks and go forward knowing and accepting them, just like parents who deci e to go forward with a high risk birth are made aware of the inherent risks and potential consequences in doing so. Indeed, by analogy, the proposed amendment is the equiva ent of barring a physician who is asked to deliver a baby in a high risk delivery where both r other ar baby could die, from asking the parents to sign an informed consent form. I am awar of no legal precedent for such a prohibition and I suspect that such a bar would not survive egal challenge.

Finally, the proposal to make domestic agencies liable, apparently strictly and vicariously, for the acts of those individuals helping them overseas is also unrealistic nd of doubtful legal enforceability. Traditional and accepted notions of vicarious tort liabil y in this country are predicated upon fault and the control or right to control the actions of ano her. Thu an employer in many circumstances can be held liable for the acts or omissions of an mploye under the employer's control. Here, however, the proposed amendment would hold d mestic international adoption agencies responsible for the acts of persons overseas that they ften hav no control over at all, who act independently, and who are subject to different oversig t, rules and regulations in the host country.

Keeping in mind that existing concepts of liability already subject domestic ag encies to liability for the malfeasance of those overseas individuals who they do in fact control r have t right to control, the proposed amendment would render the agency liable for any negl gent act done by anyone under any circumstances involved in a particular adoption so long as he agen was working with them in some capacity. So, for example, an error made by a pediat ician wh regularly attends to orphanage children by mandate of some rule or regulation in the h ost country, and who the agency did not choose but must deal with, becomes, potentially, the liability of the domestic Unites States agency. This is true despite the fact that the all ged act r omission occurred in a foreign country and the agency had no control over the quality of the c given or an ability to insist upon a different pediatrician. Putting aside the jurisdictio al unfairness inherent in such a situation, and putting aside the likely unwillingness of a insurer even to insure against acts or omissions of a non-employee, the imposition of this typ of liability is unheard of in our system to my knowledge.

In combination, the above proposals, I am confident, will simply put most age icies out business. Agencies subject to strict, vicarious liability for the actions of persons they annot control, unable to insure against the risks, and unable to ask prospective adoptive par nts to accept the risk, will not continue to operate. As agencies close down, children will b left abandoned in orphanages.

I do not think there is any way to overstate the dramatic and negative impact the proposed amendments will have on children living in orphanages. When I think about my own experience as an adoptive father, I am deeply saddened to think regulations which are no doubt well intentioned, will actually destroy the very system they are hoping to protect.

Thank you for your consideration.

Very truly yours,

Howard M. Cooper

HMC:cas

The Bulletin of the Joint Council on International Children's Services

The Joint Council
on International Children's Services

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About the JCICS Bulletin

The Bulletin is a quarterly publication of The Joint Council on International Children's Services from North America. The Joint Council is an affiliation of licensed, not-for-profit child welfare agencies that serve children through intercountry adoption and relief efforts. The Joint Council advocates for homeless children around the world, provides a forum for sharing information enabling children to be served more effectively, promotes legislation and procedures that better meet the needs of children, disseminates information related to children's issues, and establishes guidelines and standards of practice that protect the rights of children, birth parents, and adoptive parents.

Inside this issue...

A Voice for Children

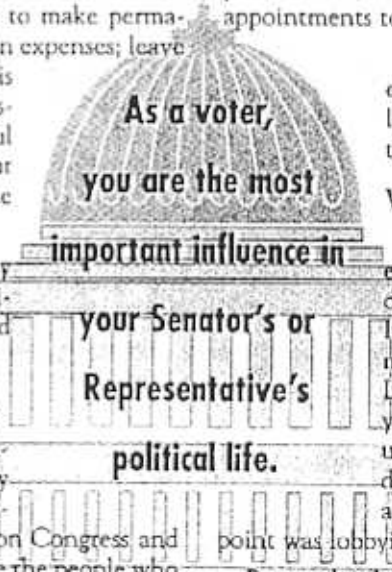
The Hague Convention on Intercountry Adoption and its implementing legislation were introduced in Congress in March; the Hope for Children Act seeks to make permanent the tax credit for adoption expenses; leave equity for adoptive parents is likely to be considered this session — these are all powerful reasons for you to learn about and exercise your influence over federal legislation.

The following "advocacy tips" were adapted from materials provided by the Child Welfare League of America.

Making your agenda a reality

You don't have to be a high-powered, well-paid, politically-connected Washington lobbyist in order to have an effect on Congress and the legislation it passes. You are the people who elect a Member to Congress and therefore the most important influence in your Senator's or Representative's political life.

Your elected representatives in Congress take very seriously written letters, e-mail messages, and personal visits from you regarding a particular issue — it's their job. Senators, Representatives, or their staff will return your phone calls, answer your letters, and make appointments to meet with you.



You can strengthen your effectiveness as a grass-roots lobbyist by using some of the techniques discussed below.

Writing Members of Congress

In many cases, a letter expressing a given viewpoint can change a legislator's mind. It is particularly helpful when a member is wavering on an issue. If, despite your literary talents, your legislator's vote is still unfavorable to your position, don't be discouraged — it probably means that the other viewpoint was lobbying even harder than you.

Personalized (even handwritten) letters on your own stationery are the most effective. While form letters, post cards, petitions, or e-mail messages are all read and answered, they don't carry the weight and persuasive power that a letter from a constituent does.

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Limiting Adoption Agency Liability

by Carl A. Jenkins

Because of the personal and emotional nature of adoption, it is nearly impossible to predict when a lawsuit will show up, or what will be the exact factual grounds which give rise to a claim for "Wrongful Adoption." Regardless of how well-informed the clients are, or how carefully drawn the limitations upon the services to be provided, the facts surrounding any alleged claim for damages will control both the legal theory and its application to a specific instance.

This is where good policy and practice will pay off — good routines and habits beget good results. Even so, good policy, practice, and defensive legal precautions may not prevent an actual lawsuit.

This article will review certain precautions and affirmative actions an agency can take to protect itself from future liability, and ensure its continued survival to accomplish its mission, in the event a lawsuit does arrive.

Assumption of Risk

The purpose of a contract is to set the terms and conditions of performance of mutually agreed-to actions (services and/or products) between two or more parties, prior to initiation

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Limiting Liability -- continued from page 1

of the performance. That is, to set the boundaries or parameters of the bargained-for agreement.

There are numerous other terms of the services to be provided which can be negotiated, allocated, divided, quantified, and the like, with the litmus test in "social service" transactions generally of the "reasonableness" standard. That is, if some contract terms are "unconscionable" or "against Public Policy" then they will not be upheld by a Court. (Examples include fraud, usury, or conspiracy to commit a criminal act.)

Adoption agency contracts are agreements to perform services, which place them in a distinct category from some other forms of contract. Therefore, the legal phrasing and detailing in the agreement of exactly what services are contracted for, and under what conditions, become critical when, for reasons beyond the control of any or all of the parties involved, the bargained-for results either do not occur, or do not occur to the nominal satisfaction of one or more of the contracting entities.

A carefully drawn legal document can limit an agency's future potential exposure, as certain variables, in particular the risk of a "less than perfect" adoption (however defined), can be contractually allocated between the parties.

This concept is known as Assumption of Risk, and it has been the subject of much historical litigation, beginning when the first, prehistoric sailor ever left one port with the intent of transporting an object to another port for profit.

Waiving negligence

In addition to allocating the Assumption of Risk and other terms of agreed-to services, the parties can also agree to waive, in advance, potential future claims they may acquire.

Under traditional contract law, parties are permitted to waive negligence. The recent holding by the Federal Circuit Court for Washington, D.C., of the waiver clause in an adoption services agreement is important because the majority of the "new" theories of liability rely on some form of "duty" owed by the service providers to the client(s). Normally the breech of this duty is most often found in the failure to act, rather than an overt or intentional miscreant behavior. (It is generally agreed that a claim for intentional fraud cannot be waived, regardless of any contractual language, because that would be both unreasonable and against Public Policy.)

This unintended failure usually resonates as some form of negligence. Again, how-

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ever, the litmus test of negligence in a failure to act is usually based upon some scale of reasonableness — if the behavior in ·stion is too extreme, it becomes action-

nformed Consent

Informed Consent is the process by which a person making a major, life-affecting decision becomes completely familiar with all the material and relevant details which would influence that person's choice in reaching such a decision.

As a "good practice" standard, Informed Consent is simply good business. As a barrier to legal exposure, Informed Consent is (1) an absolute, (2) non-equivocal, and (3) necessary prerequisite to beginning to perform adoption-related services. An uninformed consent and/or waiver is meaningless, and will be treated by any court as exactly that.

(Think: What did the surgeon do when your father underwent heart bypass surgery? The doctor had him sign a "release and ·aiver" after a full, written iew of the risks involved, nich your father agreed to assume, and consented — in writing — to the operation. Importantly, one does not request a "consent" after the patient is on the operating table, with the scalpel already in service.)

An agency should not perform adoption-related services before the client(s) have agreed, and consented to, the terms of the service about to be performed...timing is everything.

Should an agency offer a child for adoption prior to the client(s) signing a service agreement, the consent and waivers may be void, because of possible "coercion" claims (the adoptive jargon is "dangling").

Informed Consent acknowledgments aid in a "negligence" lawsuit because all parties have agreed, in advance and before initiation, that the terms of service would also include who is going to assume the risk of any unintended mistake alleged to have occurred during the course of the "social ·ervices" transaction.

nowing and intelligent waiver

For a waiver to be valid as a result of informed consent, the terms must be clear. There are certain phrases called "legal terms of art" (also called "standard boilerplate") with which all attorneys are familiar because they mean the same thing everywhere. At a minimum a service agreement should contain these terms. In addition, the clients should be advised in writing that they have the opportunity to consult with outside third-parties — doctors, lawyers, etc. — if they wish.

It is important that agencies keep in mind the adage used by accreditation representatives of all flavors: "If it isn't in writing, it doesn't exist!" Of course, it is impossible to completely anticipate all possible permutations of potential problems that can occur during the adoption process, so phrases such as "including, but not limited to..." are imperative.

It is also important to say it more than once, and in several documents. All documents should be signed by the client(s) and returned to the agency for placement in the client's file, to demonstrate that the client was advised — in several ways.

Principal vs. agent

In a "social services" transaction where the goal is to work together toward a relationship of trust and confidence, ignorance on the part of any one participant can place the entire enterprise at jeopardy. The better informed the clients, the more likely their decisions will be based upon realistic expectations and therefore more correct and appropriate for their needs, as well as the child's needs.

However, in today's adoptions, and particularly international ones, the agency and parents are not the only participants involved. Regardless of their respective awareness, we come to the next hurdle: When is one of the participants in the adoption process someone for whom you are responsible — like it or not?

The legal concept of principle vs. agent is also sometimes known as an employer/employee relationship. Depending on the legal definition of your working relationship, if you, the employer or the principle, use an employee or agent to accomplish your goal, then as the principle, you may be vicariously liable for any cause and/or effect of the agent's action.

For example:

- Do you use contract social workers to perform homestudies?
- Do you use overseas coordinators to identify children for placement?
- Do you refer prospective parents to specific medical doctors or other social service professionals for an assessment of the adoptive child's health or social conditions?
- Do you hire an outside translator for foreign language documents, or is it done by one of your staff members?
- Do you network with other agencies to place children?

Conduct within the scope of employment

Within the adoption community today, there is much confusion about what differentiates an "independent contractor" from an "agent": as the principle, an agency may be liable for an agent's actions; independent contractors, by definition, are "independent." Whether or not one particular person is, or is not, an employee of another is the subject of various legal tests known to most lawyers and/or human resources personnel. Get competent advice if there is any doubt.

For example:

- Do you execute interagency contract agreements which clearly define the roles and scope of authority of each participating agency?
- Is it clear to clients that the agency is not "recommending" one particular independent services provider, such as a specific medical doctor or translator?

This is important because recently some attorneys have advanced a legal theory of negligent referral, when an agency recommends one specific outside consultant. The failure to clearly delineate relationships

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Acknowledgments

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between an agency and a translator or medical doctor could be interpreted as an affirmative failure to act by adoption agency representatives, and thus either intentionally or negligently cause the client(s) to be "misled" by bad "advice" from a professional whom the client believes is an agent for the adoption agency.

Agencies should develop contracts for an independent contractor's work-related performance that clearly define the boundaries of their services. If an individual or entity's conduct is not within the "scope of employment," then there is no vicarious liability for such conduct.

Make sure the clients clearly understand the non-employer relationships to other third-parties performing services — are the services on behalf of the agency or on behalf of the client? If the services are actually on behalf of the client, perhaps a separate agreement between the client and other third-party service provider is appropriate. (Remember informed consent?) This could also be an "assumption of risk" that could be allocated by agreement between the various contracting parties to an adoption.

Third-Party Intervenors

Unique to international adoption service providers, however, is a distinct characterization of one type of independent contractor that cannot be avoided. This legal concept, generally, is known as a "Third-Party Intervenor."

At some point in the process, there will be a person or legal entity over whom none of the parties involved in the agreement (for certain, discreet services) will have any control whatsoever. And the completion of the adoption will not happen without the participation and collaboration of that Third-Party.

These types of third-party intervenors are also commonly referred to as "wild cards" or "kickers." The common vernacular within international adoption circles includes, but is not limited to, "that INS official" or "that foreign government official." Third-Party Intervenors should be clearly mentioned, defined, explained, and accounted for in the adoption services agreement, in the event of their non-cooperation, which may well be "within the scope of *their* employment."

Good practice policies

Just as a contract defines the boundaries of an agreed-to exchange between two or more parties, policies and procedures define the why's and how-to's of implementation of the agreed-to services being provided. Thinking through and establishing good, solid, routine procedures from clear policies will do wonders.

One benefit of good policy is that roles are clear, boundaries defined, responsibilities delegated, and there is a cognizable chain-of-command for the decision-making process. That is, there is at least a minimum standard of service which all employees recognize the clients should receive. As a result, the agency staff will develop a "corporate culture" based upon the service standards adhered to and expected of them.

"An agency should not perform adoption-related services before the clients have agreed and consented to the terms of the service about to be performed...timing is everything."

Customer service

While the various State jurisdictions vary in their legal requirements, an affirmative attempt by an agency to meet the most restrictive requirement of any of the agency's working locations — as a minimal standard — may prevent a potential lawsuit. Aside from that, however, the agency can be assured that the services being offered meet the legal community's reasonable expectations. To meet those expectations, an agency should:

- Establish milestone events which must be met during the process in order to move to the next level of the process.
- Regularly log — in writing — telephone conferences with both clients and third-party, independent contractors, and confirm the details of the agreed-to process — in writing.
- Keep copies of all documents and paperwork.
- Have the clients sign receipts indicating they received the appropriate training materials, child referral or placement information, and third-party referral options (do not make those choices for them).

Remember: "If it isn't in writing, it doesn't exist."

Serving the agency mission

Just as agencies are not-guarantors of a child's health, emotional, mental, or psychological well-being, they are not the guarantors of those entities in the adoption circle over which they have no control; know what those boundaries are.

With new, statutorily-required "disclosure" and "duty-to-investigate" standards being instituted, what is "reasonable" is still on shifting sand. For this reason, "good practice" standards are imperative to maintaining the agency's mission — you cannot place orphaned and abandoned children in loving homes if you are out of business.

Conduct a "legal audit," similar to a financial one, on a regular basis. Some basic questions might be:

- Have you, by failing to get clear agreements between all involved parties to the adoption process, made yourself, in legal effect, a *de facto* principal to some other entity's actions and assumed the liability for their conduct?
- Have you made reasonable attempts to accurately ascertain and transmit all the current, material, and relevant non-identifying medical and social "facts" concerning the child offered for placement? (Be sure you are not providing conclusions, unless you are a trained, licensed, and bonded medical professional.)
- Have your clients agreed in advance (without dangling a child-placement) to your services with informed consent and appropriate counsel, from third-party trained professionals of their individual, independent choice, so they may formulate their own, appropriate conclusions unique to their personal circumstances and situation, by weighing the various risks and assuming the consequences of their considered decision — that is, have they knowingly Assumed the Risk?

Just remember, all the legal mumbo-jumbo in the world cannot overcome sloppy or shoddy work. Having solid policies and procedures, i.e., minimum standards, is what protects you from the most dangerous of all legal components: The Facts. Those darn facts are just really difficult to avoid — they are what they are, and once done, you cannot change them!

Carl A. Jenkins is Associate Director and General Counsel of World Child, Inc., 1400 Spring St., Suite 410, Silver Spring, MD 20910; 301-588-3000. *This article is not intended to offer specific legal advice; consult your own legal representatives.*

Appendix D: Samples of informed risk waivers

Samples of informed risk waivers will accompany JCICS' hard copy submission to the Department and are not included in the electronic version.

Informed Consent

Matters Beyond Uniting Families Foundation's Control

_____, as a prospective adoptive parent, am seeking to adop a child/children in a country, society and culture which may be different in many ways from th i own. As a prospective adoptive parent, I acknowledge that there is much in the c urse of n international adoption over which the Uniting Families Foundation (UFF) has o contr l, including but not limited to the availability of children in a particular country, politica upheav l, negligent or dishonest officials, doctors, orphanage directors and others in the country o origin, changes in the law or administrative requirements of the United States or the country o origin, and explained or unexplained delays or adverse judgments by officials r decisi n makers in the United States or the country of origin. Any of these factors ma / delay o preclude the adoption. UFF cannot guarantee the timing or completion of th adopti n process, or that the child/children referred to me will be from a particular country.

Child's Future

UFF cannot predict an adoptive child's present or future, intelligence, personality, llergies o other health problems, learning disabilities, appearance, skin color, inherited chara teristics o other traits. Medical records and general history of the child/children may be inc mplete o inaccurate. A reasonable attempt is made to present a child with health problems rom bei g placed as a healthy child; however, there are times when health conditions cannot e diagnosed in infants and small children, especially under circumstances where the mo st sophisticated medical practitioners and facilities are unavailable. In addition, there a s occasions where misdiagnosis by foreign physicians or American physicians reviewi g information provided by foreign authorities occur due to incomplete or inaccurate inf rmation, c misrepresentations made by caregivers or medical practitioners in the country of o igin. Th s information may either overstate or understate the child's medical problems. It is th s responsibility of the prospective adoptive parent, at their own expense to satisfy the nselves if the child's physical and mental condition and health status. It is also possible that a child m y become ill during the trip to the United States. These and all other foreseen and u nforese n risks affecting the timing and or completion of the contemplated adoption are assu ed by t e prospective adoptive parent.

The undersigned has read and fully accepts the conditions herein and do hereby release and old harmless now and in the future the Uniting Families Foundation and it's directors, officers, em ployees and agents from all circumstances or acts beyond their control.

_____ _____

Signature Date

Subscribed and sworn before me this _____ day of _____, 20____

_____

Notary Public

525-8049

WIDE HORIZONS FOR CHILDREN, INC.
Adoption, Support and Counseling Services

38 Edge Hill Road • Waltham, Massachusetts 02451 • (781) 894-5330 • Fax: (781) 899-2769 • www.whfc.o

STATEMENT OF FINANCIAL RESPONSIBILITY, ACKNOWLEDGMENT, ND WAIVER

We, have read and understand the general information package and schedule of Wide H rizons For Children, Inc.'s fees and we acknowledge that Wide Horizons For Children, Inc.'s ac ptance of our application is for a commitment to a home study only and not in any way a guaran e or promise that Wide Horizons For Children, Inc. will be able to provide us with a child. W understand that Wide Horizons For Children, Inc. does not have control over various ado tion programs due to the fact of the ever-changing international climate. Wide Horizons For Children, Inc. will assist our adoptive parents in their quest for a child in every way possi le either through Wide Horizons For Children, Inc.'s own programs or through parent-initia d sources.

We understand that Wide Horizons For Children, Inc. has no control over the length of ti ne necessary for each parent to remain in ~~Russia~~ while picking up their child nor as to the an ount of money required as expenses in said ~~Russia~~.

We also agree to be financially responsible for UNKNOWN the child to be assigned to u for adoption from the time of her arrival. We agree to pay all expenses in connection with er care and support, including costs relating to undiagnosed or unforeseen medical conditions wh ch are not covered by our insurance. In the event that it should become necessary for UNKNOW N to be removed from our home, we agree to continue to be responsible for the cost of her sup ort until it is assumed by other persons or entities. In no event will Wide Horizons For Child en, Inc. be held responsible for the care and support of said UNKNOWN following her assig ment to us.

The undersigned prospective adoptive parents (hereinafter called "parents") hereby under tand that it is the policy of Wide Horizons For Children, Inc. to require medical reports on the child and that UNKNOWN, the prospective child will not be assigned until said medical repor has been received and reviewed carefully by the parents and Wide Horizons For Children, Inc Wide Horizons For Children, Inc. will not take any responsibility for the contents of the medica report, and the parents hereby acknowledge that the medical report may not meet the standards c rrently in existence in State of ~~Connecticut~~.

In certain situations, some countries of origin fail to provide any medical reports whatsoe er. The undersigned hereby acknowledge and understand that this is a possibility and, if appl able to their situation, the parents will be advised by Wide Horizons For Children, Inc. that no medical report is available.

If a medical report is unavailable, the parents, at their option, may choose to waive the medical report and accept the child for adoption, but Wide Horizons For Children, Inc. cannot take any responsibility for the medical background or medical condition of UNKNOWN, the prospective child.

We attest that all information we have stated in the application and supporting information is true and accurate to the best of our knowledge.

SIGNATURES

_____ _____

NOTARY:

Suscribed to and sworn before me this_____day of_____, 20

at_____.

_____

(Signature of Notary)

My commission expires _____

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INDEMNIFICATION AGREEMENT AND FINANCIAL RESPONSIBILITY FOR PARENT/PARENTS TRAVELING INTERNATIONALLY

The undersigned prospective adoptive parents have applied to the following program through

herein referred to as the country.

We, . understand that the program requires us to travel to the Country in order that we comply with the laws and customs of that Country.

We acknowledge and understand that WHFC has no control whatsoever concerning, but not limited to, the following:

1. the cost of our stay in the Country, which cost, we acknowledge is completely our responsibility;
2. the length of our stay in the Country;
3. the success of our stay in regard to our being permitted to either legally adopt or being appointed as legal guardian of our prospective adoptive child;
4. the success of our being permitted to remove the child/children from the Country in accordance with the Country's laws and the United States Immigration and Naturalization Laws.

We acknowledge and indemnify WHFC concerning the risks involved in traveling to the Country including, but not limited to our safety and health.

Wide Horizons For Children, Inc. has used its best efforts in informing us as to what our responsibilities are concerning the Country and what we expect upon our arrival and stay in the Country.

_____ _____

NOTARY:
Subscribed before me this ____day of _____20 .

WIDE HORIZONS FOR CHILDREN, INC.
Adoption, Support and Counseling Services

38 Edge Hill Road • Waltham, Massachusetts 02451 • (781) 894-5330 • Fax: (781) 899-2769 • www.wh c.org

AFFIDAVIT OF RESPONSIBILITY

Wide Horizons For Children, Inc., a licensed child welfare agency in the State of Con ecticut a agreed to provide placement services for from with .

From date of departure from, is considered a legal dependent of as such, the family h s total responsibility for all costs related to the child's care, rearing, housing, and education i cluding costs for conditions not known at this time.

When a child comes from, the following costs are also the responsibility of the adopti e parent(s).

We, hereby certify that we understand our responsibilities as stated above. Furthermo re, we agree to supply the agency with a statement from our medical insurance carrier as evic ence that a child in adoptive placement will be covered by our medical insurance.

SIGNATURES:

_____ _____

NOTARY:
Subscribed to and sworn before me this _____ day of _____, 20____.

at _____.

_____
(Signature of Notary)

JCICS Questionnaire

Joint Council on International Children's Services (JCICS) surveyed our 171 member agencies and received 35 responses to questions put forward by the U.S. Department of State in the preamble of the proposed regulations.

1. Is your agency likely to seek full accreditation in accordance with subpart F rather than temporary accreditation under Subpart N? (NOTE: You must place under 100 children annually to be eligible for temporary accreditation.)

The majority of the small agencies are planning on applying for temporary accreditation under Subpart N. Two agencies were unsure until they understand the costs associated with the two types of accreditation. Five agencies plan to apply for full accreditation under Subpart F although they are eligible for temporary accreditation.

2. Is the estimated cost of providing adoption services (estimated to range from $20,000 to $30,000) in a particular case a current reasonable estimate? Yes/ No. If no, then what is a reasonable estimate?

Most agencies replied that $20,000 - $30,000 is an accurate average, though responses ranged from $9,000 - $45,000. The numeric average is $24,852.90. Certain regions are more expensive in the field of international adoption, therefore the answers varied based on the regions where the agency works.

3. What proportion of the costs of rendering adoption services are pass-through costs forwarded to foreign entities providing local services in the sending country?

The pass-through costs vary with the different regions and agencies. For example, agencies working in Guatemala rely on independent lawyers in Guatemala, so a larger proportion of fees go to that country. The average estimated pass-through cost going to the foreign country for all programs is 50.18%.

4. What proportion of the costs for adoption services in a particular case is for the cost of travel and accommodations?

Travel expenses also varied widely, ranging from 6% (Guatemala, Haiti) to 50% (Kazakhstan) of the estimated total fees. The average was 18.82%.

5. What are the estimated costs agencies and person will have to expend to comply with the standards in Subpart F? Specifically, the costs of obtaining insurance (which JCICS is trying to collect through your quotes), the cost of retaining personnel that meet the Masters Degree requirement in 96.37, and the costs of providing mandatory training to prospective adoptive parents in 96.48?

In answering questions on the additional financial burden placed on agencies and families, it was difficult to receive a solid average for the following reasons:

- Some agencies responded that they already provide mandatory training, so there would be no additional cost. Those who provide training, but which is not mandatory, stated it would increase costs $200-$500 per family.
- Some states already require that agencies employ individuals with a Master's of Social Work degree (MSWs), but those agencies that do not use only MSWs require an extra $10,000 - $25,000 per social worker. For an agency that places 50 children per year, the cost for each additional family would be $200-$1000 per family per social worker.
- Insurance premiums range from $1,300 - $250,000, but none of the policies include coverage for anyone outside the adoption agency.
- A few insurance policies do include a $1,000,000 liability, but the less expensive policies do not contain that much liability. Some agencies find that such liability is not available at an affordable cost for their size.

There is no hard data available on cost increases after agencies become more liable for other people's errors and omissions. The general consensus of the members is that it will be nearly impossible for an agency to obtain insurance when liable for actions by people other than their own employees, especially actions by people in foreign countries.

n:
t:
To:
Subject:

JCICS [jcics@jcics.org]
Monday. November 24, 2003 4:08 PM
adoptionregs@state.gov
State/ AR-01/ 96

JCICS Hague
omments -Part 96...

Attached please find Joint Council on International Children's Service's comments on the proposed regulations. We have also mailed two hard copies separately.

If you have any questions please contact Antonia Edwardson, JCICS Executive Director, at (703) 535-8045.

Best regards,
Meghan Hendy
Membership and Administration Manager

Joint Council on International Children's Service
1403 King Street, Suite 101
Alexandria, VA 22314
(703) 535-8045

Joint Council
on international children's services

November 21, 2003

To: U.S. Department of State
CA/ OCS/ PRI
Adoption Regulations Docket Room
SA-29
2201 C Street, NW
Washington, D.C. 20520
Electronically emailed to: adoptionregs@state.gov

Re: **State/ AR-01/ 98**

JCICS Comments on 22 CFR Parts 98
Preservations of Convention Records

Profile of JCICS

Joint Council on International Children's Services (JCICS) is a non-profit charitable organization comprised of North America international adoption agencies, child advocacy groups, parent support groups and medical clinics. Established in 1976, JCICS is the oldest and largest association of non-profit organizations focused specifically on international adoption. Our mission is to advocate on behalf of children in need of permanent families and to promote ethical practices in intercountry adoption.

JCICS represents 195 adoption organizations. Current membership includes:

- 171 Adoption Agencies
  - 19 Homestudy and Post Placement Agencies
  - 152 Placement Agencies and Dual Agencies (performing both home studies and placements)
- 14 Parent Support/ Advocacy Groups
- 10 Medical Clinics

In 2002, JCICS member agencies placed over 15,000 children through intercountry adoption, which is approximately 75% of all internationally adopted children placed in the U.S. last year.

JCICS Response to the Hague Convention

Joint Council embraces the ideals embodied in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, including:

- a child's right to grow up in a permanent family environment;

- sending and receiving countries and adoption service providers establishing and maintaining adoption practices that protect children and their families and that acknowledge the life-long impact of adoption;
- encouraging ongoing dialogue and cooperation between countries to ensure the continued viability of adoption as an option for children in need.

Joint Council believes that every child should remain with their birth parents or should be adopted by a family within their country of birth whenever possible. When those options are not readily available, international adoption should be a viable option. Institutionalization and foster care do not provide optimal conditions for the full emotional and physical development of children.

Through the years-long US implementation process, Joint Council has actively participated in the development of standards and procedures. We have been a source of information regarding current practices and a voice for the application of practical and workable solutions to implementation challenges. JCICS surveyed our membership in response to these regulations. What follows is a summary of their feedback. We look forward to continuing to be a voice for intercountry adoption and appreciate having this opportunity to submit our comments on the proposed Hague regulations.

Comments and Recommendations on the Regulation

Section 98.2 – Preservation of Convention Records

This regulation states that "...the Secretary and DHS will preserve, or require the preservation of, Convention records generated or received by the Secretary of DHS..." (emphasis added).

JCICS feels that the preservation of the Convention records is best granted to the Secretary and DHS. If agencies are required to preserve all Convention records then we have significant concerns about the equipment, space, and labor requirements, changing technologies over the lifetime of the records, and the significant cost this would place on non-profit agencies. Furthermore, if an agency were to close or experience a natural disaster such as a flood or fire, the records could potentially be lost. Given the 75-year rule, it is unreasonable to place this responsibility with agencies.

JCICS is agreeable to the responsibility being placed with a government office or the accreditation entities, but not with the individual adoption agencies.

➢ Recommend the following revision:

> Once the Convention has entered into force for the United States, the Secretary and DHS will preserve~~, or require the preservation of,~~ Convention records generated or received ...